

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

)	
K. Wendell Lewis)	
)	
Darrell L. Abby)	
)	
Jack L. Abernathy, Jr.)	
)	
Charles F. Acker)	
)	
Frank A. Acquavella)	No. _____
)	
Robert E. Adam)	
)	
Erich H. Adams)	
)	
Randall R. Adams)	
)	JURY TRIAL
Robert A. Adams)	FOR ALL ISSUES SO
)	TRIABLE
Walter A. Adams)	
)	
James T. Addington)	
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Paul R. Adlington)	
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James D. Agnew)	
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Frank L. Ahern)	
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Steven A. Aigner)	
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Martin D. Albang)	
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Kurt Albrecht)	

John P. Alderman

Donald J. Allen

James R. Allen

Robert R. Allen, Jr.

Robert T. Allen

Ronald J. Allen

Richard E. Alvarez

Nicholas L. Amabile

Donald L. Ames

Alan J. Anderson

Andrew J. Anderson

Clyde A. Anderson

J. Eric Anderson

John C. Anderson

John M. Anderson

Peter D. Anderson

Harry W. Andrews

Francis C. Anglin

Louis P. Anich

Gregg B. Archer

John T. Argo, Jr.

James Lee Armstrong

Roger F. Arndt

James F. Arnold, II

William E. Arnold

Donald E. Asay

David P. Ascher

Vernon G. Ash

David B. Ashworth

Robert D. Askins

Lawrence F. Aucin

Bernard J. Auer

David S. Austin

Thomas W. Avant

Gregg H. Averett

James Averett

James R. Aversman

William U. Avirett

Jim L. Avramovich

Myron J. Babler

Leroy R. Bachman

L. M. Baggett

David W. Bailey

James G. Baird, Jr.

Carson V. Baker

Larry W. Baker

Marvin C. Baker

Samuel Winn Baker

Arthur W. Bales, III

John D. Ball

Harry G. Ballance, Jr.

Gregory W. Barber

Raymond E. Barber

Thomas Roy Barefoot

George D. Barlow, Jr.

Douglas E. Baron

George J. Barr

Benjamin B. Barrett

Paul H. Barrett, Jr.

Chelsea LeVone Bartenfeld

Jerry N. Bartlett

Jon H. Barton

Leslie E. Bates

Gerald H. Bauer

Russell Carl Bauer

Frederick J. Beardsley

James W. Beaubien, III

Bruce M. Beavers

Richard A. Beck

Thomas V. Beck

George L. Becker

Robert W. Beckman

William P. Beede

Earl H. Behrens

Raymond L. Bell

Louis A. Belline

Timothy W. Bellury

Robert B. Benham

Sterling N. Bennett

Charles A. Benson

Tommy Ray Bentley

Roy B. Bentson

George E. Berg

Dean H. Berk

Steven D. Berman

Damon R. Berry

Ronald J. Berry

Douglas E. Best

Charles E. Bethel

James R. Bettcher

Leo D. Bezdek

Charles L. Bible

George L. Biles, Jr.

Joseph P. Bilotta

Albert C. Biniasz

Jack L. Birchall

John Heflin Birge

Michael W. Birmingham

Joseph H. F. Bissell

Christopher S. Black

Reuben Black

Johnny H. Blackmon

Byron R. Blackwell

Steven L. Blackwood

Robert A. Blanton

Michael S. Blaskovich

Claudia A. Blaz for the Estate of Delbert Schwab

Jack G. Blaz

Robert J. Bloink

Roy E. Blomgren

Wade D. Bloom

George E. Blosser

David E. Blubaugh

Robert H. Bluhm

Ralph N. Boatwright

Michael J. Bober

William R. Bodine, Jr.

John A. Bodmer

James J. Bodnar

Kenneth J. Bogle

Michael R. Bolier

Duane A. Bolin

Ronald O. Boltz

James S. Bomar

William Philip Bommer

Robert F. Bonaccorso

Ross F. Bonny, Jr.

Frederick O. Boone, Jr.

Lloyd D. Boone

Frederick C. Borchert

Bruce Borland

Leland R. Bos

Douglas M. Boston

Frank M. Bottoms, Sr.

Barry C. Boustead

Michael M. Bowen

Connie J. Bowlin

Estate of Edward Bowlin c/o Connie Bowlin

Allen W. Boyce

Jan K. Boyd

John E. Boyd

Dan L. Boyd, Jr.

William E. Boyle

Donald O. Bradford

Richard J. Bradley

Bryce L. Bramsen

Robert A. Brandon

William C. Brant

James Carroll Brasher

Oscar D. Braswell

Ralph M. Braswell, III

Charles M. Bratton

Charles B. Bray, III

James A. Brekke

Thomas A. Brennison

W. Charles Bridges

Daniel W. Bridges, Jr.

William F. Brindell

William E. Brintnall

Larry W. Bristow

Harold S. Brito

Penny L. Brock for the Estate of William Brock

Charles Brockway

Ralph S. Broderick

William Bronson

Jimmie L. Brooks

William Charles Brooks

Stephen P. Bross

Estate of Andrew P. Brown
c/o Charlotte Brown

Charles E. Brown

David A. Brown)
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Fred M. Brown)
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Estate of Kurt H. Brown)
c/o Else Brown)
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Mark J. Brown)
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Melvin Brown)
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Michael W. Brown)
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Randall H. Brown)
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Robert Craig Brown)
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Robert G. Brown)
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Robert K. Brubaker)
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David W. Bruce)
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Leonard C. Brunasso)
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Ronald G. Brundridge)
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Robert W. Brushwyler)
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Robert M. Bryant, Sr.)
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William G. Bucklin)
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Estate of Henry T. Buczek)
c/o Diane M. Buczek)
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Thomas C. Budd)

William C. Buergey)
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Carl R. Buettner)
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Andrew L. Bukaty)
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John F. Bulger)
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Charles R. Bumgarner)
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Myrl W. Bundrick)
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William R. Buntin)
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Clarence M. Burch)
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James Lee Burge)
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Jerald C. Burgess)
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Larry J. Burgy)
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Edward Devin Burke)
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Patrick J. Burke, Jr.)
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W. D. Burkhardt)
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Ferree R. Burkhead)
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Gerald R. Burnett)
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Raymond C. Burnett)
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Charles D. Burnfield)
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John F. Burns)
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Robert D. Burns)
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Robert M. Burns)
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Dennis E. Burton)
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Geren E. Burton)
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Donald J. Bushey)
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Ronald V. Butler)
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Samuel B. Butler, III)
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Thomas P. Butt)
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Thomas E. Byde)
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Raymond S. Bye)
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James B. Byrd)
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Lester M. Byrd)
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John Charles Byrne)
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Phillip J. Byrnes)
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James V. Cagle)
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Michael J. Cahill)
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Albert W. Caiazza)
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John B. Cain)
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John Caldwell)
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Clarence W. Callahan, Jr.)
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Dana A. Callanan)
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William E. Callaway)
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Thomas J. Calvanelli)
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Donald L. Camp)
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Benjamin M. Camp, Jr.)
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Alan D. Campbell)
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Arthur L. Campbell)
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Robert K. Campbell)
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Therman L. Campbell)
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Buddy W. Candelario)
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David J. Cann)
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Charles Milner Cannon)
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Partick A. Cardinale)
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Charles A. Carlon)
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Timothy L. Carman)
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Robert L. Carmical, Jr.)
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Walter C. Carmichael)
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Craig W. Carpenter)
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James D. Carpenter)
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Jack E. Carr)
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Henry G. Carrington)
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Robert A. Carson)
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James L. Carter)
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John R. Carter)
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Timothy J. Carter)
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Francis T. Caruso)
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Laurence L. Casada)
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Lawrence Casale)
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Robert J. Caster)
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Estate of Clayton N. Castle c/o Karen L. Castle)
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John P. Catchings)
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Frederic N. Catoni)
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John S. Caughman, III)
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Malcolm D. Cauldwell)
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Olin H. Causey)
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Michael B. Cavanagh)
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Marty J. Cavato)
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Edward Nelson Caylor)
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John Paul Cerak)
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Charles David Ceraso)
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Richard C. Chabot)
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Mark S. Chaffin)
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Edward L. Chambless)
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David A. Champa)
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Thomas A. Champley)
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Charles E. Chauvin)
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Robert Tracy Cheatham, III)
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Ely Chen)
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Kenneth G. Chirhart)
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Noble C. Christensen)
)
Estate of Gene E. Churchel)
c/o Heather D. Ciepiela)
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Jerry A. Church)
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James J. Cianci, Jr.)
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Robert Cinibulk, Jr.)
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Eric L. Cintron)
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Dion F. Clancy)

Bryan R. Clark

David J. Clark

Forrest C. Clark

George B. Clark

Richard L. Clark

Christian M. Clausen

Stuart M. Clay

Craig D. Cleveland

Alan Richard Click

Estate of David W. Clifford c/o Jean Clifford

Timothy C. Clifford

Glenn D. Cloes

Spencer W. Closson

Luke E. Closson, Jr.

James Dwight Cloudt

Maurice Cloutier

James C. Cochran

Mac H. Cochran

Edward E. Cody

Richard E. Coe

John E. Coffin

James S. Colby

Richard E. Colby

Clifford I. Cole, Jr.

William D. Colegrove

Craig S. Coleman

George S. Coley

Donald B. Collins, Sr.

Glen H. Collins

Eric M. Coloney

Phil E. Colston

James D. Compton

Raymond D. Compton

Michael J. Conaboy

Edwin L. Conrad

Dale M. Content

Darwin F. Cook

John E. Cooley

Ronald T. Cooper

William A. Cooper

John B. Cooper, Jr.

David J. Copeland

Henry N. Coppola

Robert D. Corder

Denise B. Cordero

Pat A. Costa

John N. H. Costas

Bobby W. Costilow

Joseph A. Coughlin

Daniel H. Courtney

Harold W. Cousar

Michael L. Cox

Michael C. Crabtree

Estate of Robert D. Craft
c/o Alycia A. Craft

James R. Craig

Richard P. Craine

Stephen M. Crawford)
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Stephen R. Crawford)
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Dohrman G. Crawford, Jr.)
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Ronald E. Crispe)
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Thomas Croasdale)
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Kenton W. Crockett)
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John D. Crofton)
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Edward C. Cronin)
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James A. Crookston)
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John W. Crotty)
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Charles W. Crow)
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Richard D. Crow)
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Samuel W. Crow, Jr.)
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Robert L. Cuddeback)
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Bruce J. Cullen)
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Mark S. Cullings)
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David G. Culpepper)
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William S. Cunningham)
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William Tolliver Cunningham)
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Walter R. Curry)
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Gary L. Curtis)
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Richard L. Curtis)
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Clark A. Curtiss)
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Terry L. Cusick)
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John MacKay Daley)
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Fred J. Dambrie)
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Ray A. Daniel)
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Bruce E. Dantzler)
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Frank W. Daugherty)
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David M. Davis)
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Guy W. Davis)
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James W. Davis, Jr.)
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Robert W. Davis)
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Estate of Ronald S. Davis c/o Gloria G. Davis)
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Thompson Henry Davis)
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George Trent Davis III)
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Charles P. Dawson)
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Thomas Day)
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Andrew M. Deane)
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Rex L. Dearden)
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John R. Dearie)
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William C. DeAugustinis)
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Robert G. Decker)
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James E. Degnan)
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Dennis A. DeGuire)
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William R. DeLine)
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James R. DeLuca)
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Michael E. DeMarino)
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Bruce H. Dement)
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Bruce T. DeMoss)
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David D. Dempsey)
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Robert J. Derr)
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John A. Derrick)
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Patrick L. Deschner)
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Thomas M. Destefano, Jr.)
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Mark J. Detwiler)
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Wesley R. Detwiler)
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Joseph A. DeVelis)
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Gary D. Dicke)
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Lewis H. Dickson)
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John F. Disosway)
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Charles A. Dixon)
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Francis A. Doherty)
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Dennis J. Dolan, Sr.)
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Richard M. Dolan)
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Aurelio O. Donato)
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Ron L. Donckers)
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William W. Doonan, Jr.)
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Bernard J. Doubler)
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James P. Draffin)
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Roger E. Drake)
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Gerard F. Dreiling)
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Paul F. Dresser)
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David C. Dressler)
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Glenn Frank Drover, Sr.)
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George F. Dubick)
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Roger A. Duclos)
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Stuart T. Duerson)
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Michael D. Duggin)
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James V. Dunlap)
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Bowman Ashe Dunn)
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Cecil J. Durant)
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Albin B. Dvoracek, Jr.)
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William C. Dvorak)
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Robert J. Dwyer)
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James W. Dye)
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Donald J. Eadie)
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John G. Earley, Jr.)
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Richard J. Easley)
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William M. Easterlin)
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David W. Eastis)
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Brian J. Eaton)
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Dennis M. Eberhardt)
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Larry D. Eccard)
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John E. Eckert)
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Joseph F. Edmondson)
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Robert A. Edson)
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Eric Alan Edstrom)
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James S. Ehmer)
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Marcy M. Eisenburg, Jr.)
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Claude B. Eison III)
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Joseph M. Elder)
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William F. Eldridge)
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Joseph C. Ellis)
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Paul Candler Ellis)
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Jimmy D. Elmore)
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Donald J. Engelbrecht)
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Lewis W. English)
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Douglas G. Engren)
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Herbert L. Entrekin)
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Francis P. Erckmann)
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Wayne Erickson)
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Charles E. Ervin, III)
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George D. Esselman)
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William W. Etherington)
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George W. Etter)
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Benjamin R. Eulenfeld)
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Roy R. Eveland)
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Thomas Gordon Evens)
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Peter D. Everill)
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Kendall W. Everson, Jr.)
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Emmet Robert Every)
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Joseph M. Fagundes)
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William J. Falconer)
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Peter J. Fallon, Jr.)
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George G. Farinas)
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Gary M. Farnsworth)
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Jerry L. Farquhar)
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Donald Farrell)
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Joseph A. Fatuzzo)
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John H. Faunce, III)
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Carl W. Feierabend)
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William M. Feldman)
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Larry W. Fenton)
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James T. Ferguson, III)
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Ralph J. Fernandez)
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Gary L. Fichter)
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James Hardy Fields)
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Thomas C. Fife)
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James O. Fink)
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Stephen C. Finken)
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John W. Finley)
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Charles S. Fisher)
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Douglas F. Fisher)
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Thomas M. Fisher)
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James Timothy Fitzgerald)
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Robert J. Fitzgibbons)
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John J. Fitzpatrick)
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David E. Fleming)
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Claude F. Fletcher)
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James Flocco)
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John W. Floyd)
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Michael R. Floyd)
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Gerald M Fogarty)
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George C. Fogwell)
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Michael J. Foley)
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Richard I. Fonde)
)
Estate of Richard C. Fontaine c/o Mary Fontaine)
)
John H. Foote)
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Frederick C. Ford)
)
John T. Ford, Jr.)
)
Ronnie R. Formby)
)
Bobby Ray Foster)
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Travis H. Foster)
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Cyd L. Fougner)
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John C. Fow)
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Walter E. Frayser, III)
)
Stuart A. Frazer)
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Richard A. Freeding)
)
Steven Mark Friedman)
)
Gene S. Fritz)
)

Arthur T. Frontczak, Jr.)
)
Estate of Donn L. Fryman c/o Kathleen Fryman)
)
George C. Fuller)
)
Roger D. Fuller, Jr.)
)
Allen J. Fulleton)
)
Richard L. Fulmer)
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Roland C. Gaasch)
)
William Gaillard)
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Alan L. Gaines)
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Frederick G. Gallagher)
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William R. Gallagher)
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Timothy J. Galvin)
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George P. Gandre)
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Thomas H. Gannon)
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Thomas E. Gantt, Jr.)
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James B. Gardner)
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Richard D. Gardner)
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James L. Garner)
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Jesse R. Garrison, Jr.)
)

Philip L. Garver)
)
Jon L. Geerlings)
)
Shelia M. Geisler for the Estate of Michael Geisler)
)
Gerard F. Genellie, Jr.)
)
Nicholas A. Gentile)
)
John C. Geoghegan)
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James G. George)
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John R. Gianforte)
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Thomas Gibbons)
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George L. Gibson, Jr.)
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Thomas J. Gilmer)
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Charles P. Gilmore)
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Richard E. Glantz)
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Patrick M. Glazier)
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Donald R. Glittenberg)
)
Jan M. Godsey)
)
Frederick L. Goduti)
)
William K. Goeken)
)
Estate of William G. Goff, Jr.)
c/o Karen Z. Goff)

Wallace H. Goltry

Richard A. Gooch

James J. Goode III

Robert A. Goodman

Thomas B. Goodman

Lawrence F. Goodrich, Jr.

Fred G. Gordon

Edward J. Gorman, Jr.

John C. Gottschang

Jerry C. Goulding

Dwight E. Grandia

Edward P. Graves

James H. Gray

Stephen R. Gray

Jerome F. Green

Otis J. Greene, Jr.

Charles N. Gregg

Wayne D. Gregg

Tyler R. Gresham, Jr.

Stephen T. Grice

Gerald Grieser

Robert D. Griesinger

Lloyd H. Griffin, Jr.

William A. Griffith

Lee E. Griffiths

Lawrence A. Grippo

Douglas Groff

Kenneth R. Gross

Kenneth E. Gross, Jr.

Thomas W. Grove

Ronald E. Grubb

Paul Joseph Gruebnaue

Nicholas E. Grynkeueich

Michael E. Gum

Stephen Marcus Gunn

Alexander M. Haase

Carol W. Hagle for the Estate of Conrad H. Hagle

Robin J. Haglund

Charles A. Hair

Robert D. Halcomb, Jr.

Ronald A. Hale, Jr.

Joseph R.Haley

Creston D. Hall

Frederick S. Hall

Jeffrey Fulton Hall

Micheal H. Hall

Robert F. Hall

Steven D. Hall

Thomas W. Hallam, II

Mark D. Halsor

Bertram L. Hambleton, III

Curtis S. Hamme

Milton E. Hammon, Jr.

Wendell Holmes Hamrick

Ernest L. Hand

David E. Hansen

Donald Larry Hansen

Gregg O. Hanson

Philip J. Hardy

Hobart M. Harmon

James S. Harper

John Edwin Harper

Malcolm L. Harper

Wayne D. Harper

Frederick B. Harris

Robert D. Harris

Richard C. Harris

Albert V. Harrison

John C. Harrison

John S. Harrover

William M. Hart

Nile L. Harter, Jr.

Christopher R. Hartle

Larry E. Harvey

Estate of Dennis W. Harvison
c/o Deborah Harvison

Thomas E. Hassey)
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James G. Hauf)
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William A. Hawkins, Jr.)
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William M. Hay)
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Harvey L. Hayden)
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Kenneth M. Hayes)
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Richard R. Hayes)
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Jimmy R. Haynes)
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David R. Hazen)
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Eric Hearnberger)
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John P. Heath)
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David M. Hedges)
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Joel R. Hedlund)
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William S. Heidt)
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Ralph E. Heimer)
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Peter S. Heins)
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Carl G. Heinz)
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Carl M. Hendren)
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Richard N. Hendrickson)
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Warren B. Hendrickson)
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Donald F. Henry, Jr.)
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John Dee Hensler)
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Burnett A. Hernes)
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Robert P. Herriott, Sr.)
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Scott C. Hersha)
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Gustav S. Hertz)
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Richard E. Herzog)
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Fred G. Hess)
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Robert K. Heuchling)
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Daryl L. Heusinkveld)
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Edward Lee Hibbard)
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Michael J. Hichak)
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Michael G. Hickey)
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David G. Hickox)
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Ernest W. Higgins)
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Carl R. Higginson)
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Peter L. Hilbig)
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Herbert D. Hill)
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Robert M. Hill)
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Robert A. Hillegas)
)
Estate of Edward J. Hindle)
c/o Nancy Vance Hindle)
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Marion D. Hindman)
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Rodney S. Hinds)
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Edward A. Hines)
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Johnny Harrel Hines)
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William C. Hines)
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Elmer E. Hinkle, Jr.)
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Richard R. Hirsch)
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Richard D. Hissem)
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Robert W. Hobbs)
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Donald L. Hobert)
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Fred P. Hodge)
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Warren Joseph Hodges)
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Ross M. Hoffman)
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John V. Hogan, Jr.)
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Richard Hohlowksi)
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Peter Holahan)

Philip C. Holdiness

Jack D. Hollister

Daniel E. Holloway

Richard N. Holmes

Stephen G. Holmes

Judson W. Holmes, Jr.

Thomas D. Holt

John H. Honsinger

James J. Hoogerwerf

Richard W. Hooper

Victor J. Hooper

Harry W. Hope

Stephen V. Hopkins III

Jeffrey N. Hornfeck

Roger Thomas Horrell

Charles W. Horton III

James J. Hourin

William B. Houseman

Julian R. Hovey

David L. Hovrud

Robert C. Howson

Gurves R. Hudson

Paul J. Hudson

Donald A. Huffmaster

Jerry M. Hughes

Joe H. Hughes

George G. Hull

Estate of Herbert D. Hull c/o Betty Hull

Joe F. Hulsey

Tommy M. Hunter

Arnold W. Husemann

James L. Hutson

Donald F. Hyde

Michael L. Hyjek

Allen M. Ice

James J. Igoe

Curtis A. Illies

Kathleen Ilyin for the Estate of Michael Ilyin

James A. Ingham

John M. Ingram

William L. Ippolito

Delmont S. Irving

Timothy H. Jackson

Thomas J. Jacobus

Estate of Kenneth C. James,
c/o Cheryl P. James/The James
Family Revocable Trust

Robert Q. Jameson

David Henry Jenkins

Russell H. Jensen

William L. Jensen

George Jetton

Robert W. Jewett

Alan J. Johanson

Christopher W. Johnson

Clinton Bernard Johnson

Dennis A. Johnson

James Allen Johnson

James B. Johnson

Jeffrey B. Johnson

Lance J. Johnson

Robert L. Johnson

Sheldon P. Johnson

Stephen E. Johnson

Hoyt A. Jolly, III

Dennis B. Jones

Edmund R. Jones

James Austin Jones

James Lofton Jones

James R. Jones

Larry E. Jones

Estate of Leon M. Jones

c/o Susan S. Jones

Richard D. Jones

Richard L. Jones

Robert H. Jones

Roger N. Jones

Ronald C. Jones)
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Scott R. Jones)
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Thomas L. Jones)
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William D. Jones)
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William Pickens Jones)
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Wilton R. Jones)
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Patric Jordan)
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Samuel C. Jorgensen)
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Stanley A. Jorgensen)
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William G. Jump)
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Estate of Peter G. Just c/o Janet Just)
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Raymond F. Justinic)
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David H. Kadetz)
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Gerald R. Kailing)
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Arthur H. Kaiser)
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Duane D. Kalember)
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Alan C. Kamback)
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George G. Kammerer)
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Thomas F. Kanaley)
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Robert Kane)
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William K. Kapp, Jr.)
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John C. Kapsaroff)
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Robert L. Karantz)
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John M. Karlovich)
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Jeffrey M. Kaseman)
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Douglas G. Kasemeier)
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Edward F. Kasold, Jr.)
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Doran W. Katka)
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William J. Kattula)
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Richard X. Kauffmann, Jr.)
)
R. Ford Keating)
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Stephen I. Keibler)
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Phillip J. Kelley)
)
Estate of William W. Kellner)
c/o Sandra Kellner)
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Billy Howard Kellum)
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Bernard L. Kelly)
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Jack S. Kelly)
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Michael R. Kelly)

Richard E. Keltner

Barry G. Kendall

Thomas C. Kenna

John A. Kennedy

Lawrence J. Kenney

David Thorval Kerr

Herbert F. Kerr

William F. Kerschner

Robert W. Kesler

Lee H. Ketelsen

Alfred W. Kettenring, Jr.

Eugene W. Key, Jr.

Kim B. Kilgore

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Mark L. King

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Lee Kinnebrew, III

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Kirby J. Klein

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Randolph L. Klock

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Daniel E. Koerner, Jr.

Estate of Ronald A. Kolb
c/o Gary Kolb

Attila Kontor

Daniel A. Kopack

Chad N. Koppie

Stephen M. Korcheck)
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Linwood C. Kornegay)
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Ronald L. Korthals)
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Lambert L. Kouba)
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Kenneth G. Kozimer)
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Arnold W. Kraby)
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Richard L. Kraft)
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Lawrence L. Kraker)
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David W. Kramer)
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George L. Krayniak)
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Robert E. Krone)
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Paul M. Kruger)
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Joseph J. Krygiel)
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Jesse V. Kukier)
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Frederick J. Kull)
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Samuel H. Kupresin)
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Michael B. Kutner)
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Phillip R. LaBerge)
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Chester R. Ladd, Jr.)
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David C. Lake)
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Wayne Laliberte)
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Ronald J. Lambe)
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Craig S. Lamkin)
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Ross L. Lammers)
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Timothy O. Lamons)
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Robert P. Lance)
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Douglas A. Lane)
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Margaret Ann Lane for the)
Estate of Richard G. Lane)
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Carl D. Langas)
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Rodney E. Langer)
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Theodore F. Langworthy)
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Enrique J. Lanz)
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Arthur L. LaPointe)
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Tryggve F. Larsen)
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Allen L. Larson)
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Charles D. Larson)
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Wayne B. LaRue, Jr.)
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Estate of Donald W. Lewis
c/o Donna Lewis

Roger Allan Lewis

Paul R. Lindberg

John Irvin Linder, Jr.)
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Robert F. Lindley)
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Magness A. Lindsey)
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John D. Lindstrom)
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David L. Link)
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William H. Linkroum, III)
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Richard L. Linteris)
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Sidney E. Linton)
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Michael F. Lloyd)
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Alexander W. Loeber)
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Robert S. Lomba, Jr.)
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William R. Lord)
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Andre E. Lovas)
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Billy R. Loveless)
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William A. Lovell)
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Larry L. Lowe)
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Charles F. Lowry)
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Carl Lowry, Jr.)
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Charles L. Lucas)
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David N. Lucas)
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Herbert D. Ludwig)
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William Burt Lumley)
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Kenneth Luplow)
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Stephen D. Lutz)
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John Lawrence Lynch)
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James D. Lynch, Jr.)
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James M. Lyster)
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William M. Machovina)
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Robert J. Mackey)
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Donald Mackintosh, III)
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Ronald R. Macko)
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Mark B. Macomber)
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Edward L. Madden)
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Edwin F. Madigan)
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Raymond F. Magaro)
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Anthony G. Maglio)
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John P. Maguire)
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Donald F. Mairose)
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Dan P. Malone)
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Estate of James M. Mangham)
c/o Leslie Kay Mangham)
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Joseph W. Manke)
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John C. Manstrom)
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Ronald H. Mantei)
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Larry W. Marr)
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Michael B. Martella)
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Daryl T. Martin c/o Carol Martin, POA)
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Earl Jay Martin, Jr.)
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Hall A. Martin)
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Kenneth E. Martin)
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Richard Jan Martin)
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Roger Martin)
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Thomas S. Martin)
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George T. Martin, Jr.)
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Solomon G. Martin, Jr.)
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Phillip S. Marzolino)
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David T. Mason)
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c/o Robert Miller

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John L. Milliken

Michael J. Miltenberger

Robert E. Mitchell

Harold R. Mobley)
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Timothy P. Monahan, Sr.)
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Estate of William D. Nelson)
c/o David L. Nelson and)
Robert Nelson)
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Richard Nesz)
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Stephen E. Nichols)
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Harry C. Papineau)
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Elbie A. Parham)
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David Anthony Parker, Sr.)
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James Philip Parker)
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Thomas P. Parkinson)
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Kenneth M. Parr)
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Estate of John E. Parsons)
c/o Duska Parsons)
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Robert M. Parsons. Jr.)
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James Byron Pascal)
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James Randolph Pate)
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Estate of Tommy V. Patton)
c/o Sandra A. Patton)
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Frederick B. Payne)
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James M. Payne)
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Jeffrey C. Payne)
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Samuel Thomas Peace, III)
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Kay Braxton Pearce)
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Marc E. Pearce)
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Marce M. Pearson)
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John Albert R. Peart)
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Martha M. Peart)
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Willis M. Peele)
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John K. Pell)
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Thomas H. Peters)
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Alan K. Petersen)
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George W. Petersen, II)
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Larry W. Peterson)
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Kenneth W. Phelps)
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Anthony P. Piacentino)
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Donald L. Pickell, Jr.)
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James M. Pieczko)
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Albert L. Pierce, Jr.)
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Harvey A. Pierce)
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David A. Plummer)
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Joseph C. Poe)
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Richard T. Pohl)
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Jack M. Pohlmeyer)
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James G. Pohoski)
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Keith Randall Poplet)
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Estate of Pat K. Porter)
c/o Emily Porter)
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William T. Poteet, Jr.)
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Charles E. Poust)
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Prince S. Powell, Jr.)
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Michael A. Pratt)
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Gary N. Pressler)
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Michael J. Preston)
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Alan W. Price)
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Michael J. Price)
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Charles G. Primich)
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Ron D. Prox)
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Estate of James T. Prucha, Jr)
c/o Marianne Otieza)
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George S. Pupich)
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Theodore F. Purtell)
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Richard B. Quale)
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James T. Quarles)
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Charles John Quilter, II)
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Louis F. Rabe)
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David D. Ralston)
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Robert P. Rambo)
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David R. Randolph)
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Stephen T. Raphael)
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Anthony A. Rasch)
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Charles Don Rathbun)
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James G. Ratliff, Jr.)
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Clarence E. Ray, Jr.)
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Carl W. Raymond)
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Terry A. Raymond)
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Mary K. Reagor)
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Ronald R. Reaume)
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Gary Lee Reed)
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Jerry K. Reed)
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Harry J. Reel)
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James W. Reese)
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Edward E. Rehnstrom)
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Francis C. Reidinger)
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David J. Reinhard)
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Ronald A. Reinhart)
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Estate of David M. Remley)
c/o David Brian Remley)
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David R. Remont)
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Paul F. Repp)
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Gary L. Rezeau)
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Corlin-Ann B. Rhoades)
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Gregory L. Rhyne)
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Plato S. Rhyne)
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George Kent Richards)
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Thomas M. Richards)
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James Barry Richardson)
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George Robert Rickley)
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James T. Riddick)
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Christopher R. Rieder)

Carl H. Riese

Douglas Grey Riffey, Jr.

Bennett L. Rifkin

Noel L. Riggins

Michael F. Riley

Victor A. Riley

Ronald P. Rinderknecht

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Gary Wayne Ritter

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Eugene A. Roberts, III

William P. Roberts

David L. Roberts

James R. Roberts

Dan W. Robertson

Irene C. Robertson for the
Estate of James Robertson

Max A. Robertson

Neil A. Robertson

Scott Robertson

William G. Robertson

Dean E. Robnett

Larry L. Rodammer

Knox Rodgers

Steven R. Rodnon

William J. Rodway

George M. Rogers

Ronald W. Roland

Lawrence D. Rollow

Laurence M. Romero

James M. Rosen

Roger D. Ross

Douglas T. Rounds

Mitchell L. Rowland

Allan H. Roy)
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Robert T. Royall)
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Estate of Steven M. Ruble c/o Darlene Ruble)
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Robert C. Rudy)
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Harry F. Rue)
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Thomas P. Rumble, Jr.)
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Richard L. Runnels)
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Clarence J. Rupp)
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James M. Rush)
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David G. Rushton)
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Bobby Lynn Russell)
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James Laing Russell)
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Rodney O. Russell)
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Thomas H. Russell)
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Estate of William D. Rutledge)
c/o Frankie Rutledge)
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Donald J. Ryan)
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Steven R. Ryf)
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Stephen Lee Sachs)
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Phillip L. Sain)

Warren R. Salkeld

James D. Salzmann

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Charles R. Sanders

Charles D. Sargent

Jack E. Saux

Raymond F. Sawtelle

Billy R. Scaggs

Lee E. Schalon

Colin C. Scheidt

Dennis W. Schepman

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Paul Lowell Schmoker

Martin A. Schneider

Bruce W. Schollmeyer

Norman E. Schulze

Erik Schumy

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Lockwood B. Scoggin, Jr.

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Philip M. Scott

Robert E. Scott

Roland B. Scott, Jr.

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Patricia A. Sedgwick for the
Estate of Robert H. Sedgwick

Thomas R. Seever

Richard I. Selberg

Peter A. Sellen

John R. Sellmer

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John M. Sharp

Kerin Louis Shaughnessey, III)
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Thomas W. Sheehy)
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Robert D. Shelton)
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Robert C. Shepherd)
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William S. Shepherd)
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Charles A. Sherman)
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Craig A. Sherman)
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Daniel L. Sherrill)
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Melvin L. Shettle, Jr.)
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Dennis J. Shields)
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Jack W. Shinn)
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Edward R. Shipley)
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Jack M. Shirkey)
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Michael N. Short)
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Richard A. Shutack)
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James A. Sibley)
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Charles R. Sidenstricker)
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Richard B. Sievers)
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Robert W. Sigler)
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Maynard Daniel (Dan) Siler, III)
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Charles Weatherill Simons)
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Gerald G. Simpson)
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Joe H. Singletary)
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Oneal L. Sisson)
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David W. Skjerven)
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David R. Skoog)
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Steven A. Skowronski)
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Mitchell J. Slater)
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Richard F. Smail, Jr.)
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Ronald M. Small)
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David M. Smith)
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Jerome G. Smith, II)
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Paul K. Smith)
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Reuben U. Smith)
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Stephen L. Smith)
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Frederick B. Smith, Jr.)
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Morgan Cole Smith, Jr.)
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William H. Snead)
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Robert J. Snelling)
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Charles R. Snider)
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Edward M. Sniffin)
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Thomas F. Snipes)
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Guy B. Snodgrass)
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Jeffrey W. Snyder)
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William T. Sonnenberg)
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Thomas N. Soodsma)
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Lynn D Sorenson)
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Lane S. Sorrelle)
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Taylor Lindsay Spangler)
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William R. Speaks, Jr.)
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James A. Spires)
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Don P. Spivey)
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Carroll V. Springer)
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Jerry L. Stamps)
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James P. Starkey)
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John A. Stauter, Jr.)
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Richard D. Stearns)
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William Coleman Stedfield)
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Michael J. Steele)
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Bert L. Steele, Jr.)
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Barry H. Steiner)
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Robert L. Stephens)
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David M. Stevenson)
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George Alan Stewart)
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Ronald Edwin Stewart)
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Craig A.Stienecker)
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Thomas S. Stites)
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Darryl L. Stockton)
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Herbert Stockton)
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Edward S. Stokes, III)
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James R. Stone)
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Thomas J. Stone)
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Stephen Stong)
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Robert Austin Stothart)
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Warren S. Stovall)
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Jack Stovall, Jr.)
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Keith A. Stover)
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James R. Stowe)
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Gary F. Stricker)
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Charles L. Strickland)
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Dale R. Strickland)
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James D. Struble)
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Bruce Stuart)
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Dennis Marvin Stubsten)
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Daniel Roy Stukas)
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Kern V. Stump)
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Larry R. Sturniolo)
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James H. Suckow)
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Paul J. Sullivan)
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Richard L. Sullivan)
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Steven B. Sullivan)
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Estate of Herbert Summers)
c/o Judy Harris Summers)
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Joel L. Summers)
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Roger R. Sundberg)
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Carl J. Sutkus)
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George L. Suttler)
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Larry K. Sutton)
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Michael R. Sutton)
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Steven J. Svoboda)
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Frederick G. Swain)
)
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John C. Swofford

Charles E. Sword

Donald B. Sykes

Donald K. Szatkowski

Mark J. Sztanyo

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Jerry L. Tate

John P. Tawes, Jr.

Cal W. Tax

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James Robert Taylor

Mark J. Taylor

Roger W. Taylor

Terry J. Taylor

David N. Taylor, Jr.

Lee O. Taylor, Jr.

Philip Teal

Richard C. Tedrow

Donald J. Teeple

George P. Terwilliger

Antoni A.Thelen

Peter W. Thelen

Robert W. Thome

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Don D. Thompson

Donald W. Thompson

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Stewart W. Thompson

Thomas G. Thompson

Vernon C. Thompson, Jr.

Andrew J. Thompson, III

John Steven Thompson, Sr.

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John B. Thurman

Clinton A. Thykeson

Don F. Tibbs

David R. Till

James C. Tillman, Jr.

Estate of Calvin W. Tinsley c/o Melinda Tinsley

Samuel John Todd

William S. Todd

Charles S. Tommasello

Richard B. Tourtellott

Estate of George Jerome Townsend
c/o Patricia E. Townsend

George W. Tregre

William O. Trent

Robert B. Trevathan

Frank C. Triolo

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David Trucksess

Alva B. Truesdale

Robert A. Tschurwald

John D. Tullier)
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Charles T. Tully, Sr.)
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William F. Turner)
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Robert R. Twaddle)
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Max T. Weyrick)
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Allan Charles White)
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Wilbur Larry Whitesell)
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Jeffrey B. Whitford)
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Estate of David L. Whitley)
c/o Joanne B. Whitley)
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William W. Whorley)
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Peter A. Wick)
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Herbert K. Wiese, Jr.)
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William Michael Wiggins)
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Denis Wigley)
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Walter L. Wilkening)
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Peter J. Willetts)
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Charles M. Williams)
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Donald R. Williams)
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James L. Williams)
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Lonnie Ray Williams)
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Perry E. Williams)
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Robert Mark Williams)
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Robert W. Williams)
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William F. Williams)
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William Walter Williams)

Jerry C. Williams

Richard Douglass Williams

Arthur J. Williams, Jr.

David. M. Williams, Jr.

Bruce A. Williamson

Roger Joseph Willis

Jerry D. Willoughby

Lance A. Wilmarth

Charles P. Wilson

Jefferson D. Wilson

William J. Wirth

Thomas F. Wirtzfeld

Ronald E. Wisecup

Gary L. Witt

Prentice G. Witt

Robert H. Wittig

John R. Wittmeyer

William H. Wittrig

Gerald D. Wohlford

Keith R. Wolcott

Douglas M. Wolff

Ralph E. Wolken

Peter W. Wong

James L. Wonsettler

Gary Harris Wood

Winfield W. Wood

George A. Wood, Jr.

James Edward Wood, Jr.

Larry N. Woodall

Berryman Edwards Woodruff, III

Charles R. Woods

John R. Wortmann

Earl N. Wycoff

Ronald L. Yanish

Harry C. Yarborough

Farris Franklin Yates

Richard M. Yeates

Donald R. Yockey

Alan H. Young

Barry P. Yunes

Haldane M.Zajic

Karl F. Zickrick

Gordon D.Ziegler

Robert William Ziegler, Jr.

Edward T. Zimmer

John A. Zimmerman

William P.Zipse

Don A. Zody

Dennis C. Zollweg

Plaintiffs,

v.

PENSION BENEFIT GUARANTY
CORPORATION,

Defendant.

COMPLAINT

PRELIMINARY STATEMENT

1. This is an action for equitable and associated declaratory relief by nearly 1,700 pensioners to obtain their rightful share of assets from their terminated pension plan.

2. Plaintiffs spent the majority of their careers in service as pilots for Delta Airlines Inc. (“Delta”), and more than five hundred of Plaintiffs still reside in or near Atlanta, Georgia, Delta’s headquarters.¹

3. As part of their overall benefit package, Plaintiffs were covered by the Delta Pilots Retirement Plan (the “Plan” or the “Delta Pilots’ Plan”), a defined benefit pension plan sponsored by Delta to provide its pilots with security in their retirement years.

4. This action is brought under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001 *et seq.* “One of Congress’ central purposes in enacting this complex legislation was to prevent the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated.” *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (quotation and footnote omitted). ERISA contains a

¹ Throughout this Complaint, these individuals and their beneficiaries (or in some cases, their estates) are referred to as “the Pilots” or “Plaintiffs.”

number of safeguards to protect employees against the loss of those vested benefits, including fiduciary obligations for trustees that exercise control over a pension plan's assets, and an insurance program that guarantees against the loss of non-forfeitable benefits where underfunded plans have been terminated. Congress enacted these provisions to further employees' legitimate expectations of pension benefits after years of dedicated service.

5. Another of ERISA's protections is a prioritized asset allocation scheme that governs how assets in terminated underfunded pension plans are to be divided up among plan participants, prior to and separate from the payment of insurance. Recognizing that retirees are more dependent on their pensions than active workers, Congress created a statutory priority scheme containing six categories for the allocation of assets to retirees, making the claims of older workers (like Plaintiffs), who were eligible to retire at least three years prior to a plan's termination, superior to that of their younger counterparts. For purposes of this litigation, the most important statutory priority category is Priority Category 3, or "PC3." Benefits that fall within this category are referred to as "PC3" benefits.

6. In 2006, the Plan was terminated without sufficient assets to cover all of its liabilities. At the time of the Plan's termination, roughly half of the Plan's

13,294 participants were eligible for PC3 benefits due to their age and length of service with the company. The other half consisted of younger pilots, many of whom still had decades of active service before them in which they could continue to earn income and save for retirement.

7. Unlike the younger active pilots, every Plaintiff is eligible to receive PC3 benefits, meaning that these Pilots were all at least 50 years old before September 2, 2003 (three years prior to the Plan's termination), and are, in contrast to their younger counterparts, more dependent upon their Plan benefits to provide security in their retirement.

8. This action is brought against the Pension Benefit Guaranty Corporation (the "PBGC") principally in its capacity as statutory trustee and fiduciary of the Delta Pilots' Plan. The PBGC is a wholly-owned corporation of the United States Government created to administer ERISA's mandatory government insurance program. In 2006, the PBGC voluntarily assumed responsibility for trusteeing the assets of the Delta Pilots' Plan in accordance with ERISA's provisions regarding statutory trustees, 29 U.S.C. §§ 1342 & 1344. As the statutory trustee, the PBGC was charged with allocating approximately \$3 billion of Plan assets and recoveries to the Plan's participants and beneficiaries, and to execute its duties with the prudence and loyalty required of all ERISA

fiduciaries. Contrary to ERISA's requirements, the PBGC has executed its duties with such gross incompetence or willful indifference, that it has made significant errors in the allocation process, and many of its errors and omissions have served to promote its own financial interests at Plaintiffs' expense.

9. The PBGC's choices as statutory trustee have dramatically and impermissibly favored the active pilot participants over Plaintiffs. As noted above, these active pilots are less dependent on their pensions, and have a subordinate claim to Plan assets under Congress's asset allocation scheme. Compounding the PBGC's inequitable allocation choices is the fact that, just before the Plan's termination, Delta "attempt[ed] to circumvent the statutory framework that Congress carefully crafted under ERISA,"² by funneling over \$1 billion dollars to these active pilots via their union,³ for the explicit purpose of

² See Objection of PBGC to Debtors' Motion Pursuant to Section 363 of the Bankruptcy Code For Authority to Enter into Amendments to Pilot Working Agreement with Air Line Pilots Association, International, attached hereto as Exhibit A, at 14.

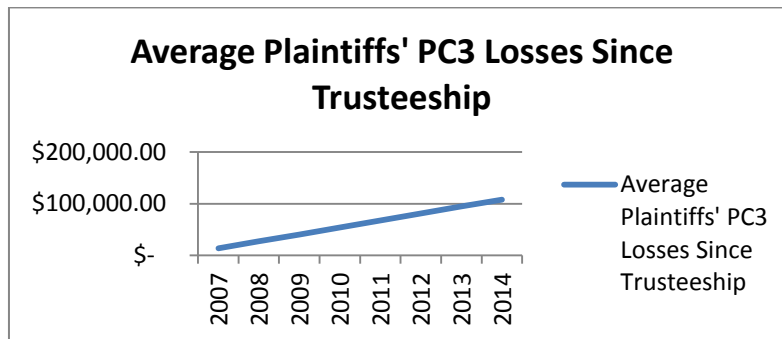
³ As described below, this payment consisted of a \$650 million note and a \$2.1 billion allowed general non-priority unsecured bankruptcy claim (collectively referred to as the "Delta Note and Claim"). The active pilots received approximately sixty cents on-the-dollar for the claim, or roughly \$1.2 billion, meaning that these pilots received approximately \$1.85 billion through the Delta Note and Claim to replace the benefits they would lose from the Plan's termination.

replacing the benefits they would lose as a result of the Plan's termination. Not only has the PBGC failed to remedy this end-run around ERISA, the PBGC has allocated Plan recoveries in such a way as to ensure that the active pilots will, once they retire, receive a double-payment for the same "unfunded benefit" for which Delta already compensated them. Indeed, once all the PBGC's allocation decisions are taken into account, these active pilots will wind up receiving *tens of millions more than what they were entitled to under the Plan if it had never terminated in the first place*.⁴

10. In contrast to their younger counterparts, Plaintiffs have suffered massive reductions to their pensions, with a typical Pilot receiving between \$1,000 - \$1,500 less *every month* as a result of the PBGC's asset allocation choices. For a retiree depending on his pension, this is a drastic cut, one whose

⁴ As described below, the PBGC has also determined, in its role as insurer, that these active pilots are collectively entitled to almost \$800 million (present value) in guaranteed benefits from the PBGC's insurance fund. Between these guaranteed funds (\$800 million), the Delta Note and Claim (approximately \$1.85 billion) and the PBGC's asset allocation choices (\$517 million to active pilots), these active pilots will have over \$3.2 billion in funds to use for their retirement. Not only does this amount exceed PC3 distributions under the Plan, as noted above, *it is significantly more than these active pilots would have been entitled to if the Plan never terminated*. Put another way, the Plan's termination, and the PBGC's subversion of the asset allocation process, has resulted in a windfall to the Plan's active participants. Moreover, because of their ability to continue working, each of these active pilots has also in the meantime been able to contribute to their employer-sponsored retirement plan.

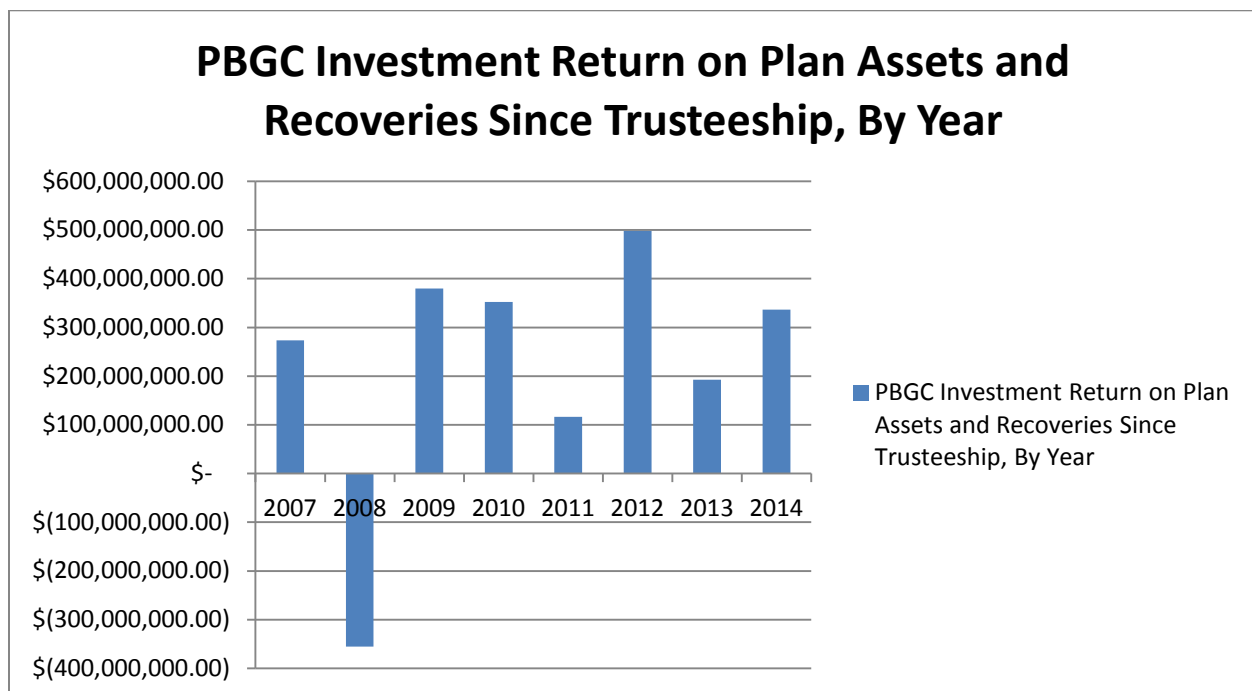
harm is, of course, compounded over time. Since the time the PBGC took responsibility for Plan trusteeship eight years ago, most Plaintiffs have lost between \$96,000 and \$120,000 (*see* chart below), and stand to lose significantly more depending on how long they live.



11. By the PBGC's own estimate, Plaintiffs (and the other similarly situated retirees who are not part of this suit) stand to lose approximately \$554 million in the aggregate as a result of the PBGC's asset allocation choices.

12. At the same time, the PBGC has invested and earned hundreds of millions of dollars in interest on the Plan assets under its control (even after accounting for the limited Plan asset allocations it is making). Investment returns on the assets the PBGC holds in trust inure solely to the PBGC's benefit, and are now the principal means by which the PBGC funds its "operational" expenses. Moreover, by consistently choosing to allocate assets to pay benefits of active pilots in the future over the benefits of in-pay retirees in the present, the PBGC

has also, at Plaintiffs' expense, maximized the amount of investment income that the PBGC will earn on the Plan's assets. Plaintiffs estimate (see chart below) that since trusteeship of the Plan in 2007, the PBGC has earned almost \$2 billion in interest from the Plan assets and recoveries under its control, even after accounting for the asset allocations it has actually paid out to the Plan participants.



13. In short, the PBGC trusteeship of the Plan's assets and recoveries has been an incredibly profitable venture for it. At the same time, this trusteeship has been a virtual disaster for Plaintiffs, who not only do not receive any of the PBGC's guaranteed funds, but are also denied the asset allocation and recoveries they are entitled to under ERISA.

JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of this lawsuit pursuant to 29 U.S.C. § 1303(f), as well as 28 U.S.C. § 1331. Declaratory relief is proper pursuant to 28 U.S.C. § 2201.

15. Venue is proper in this District pursuant to 29 U.S.C. § 1303(f)(2) and under 5 U.S.C. § 703. More than five hundred Plaintiffs still live near or in Atlanta, Georgia. Historically, Delta maintained the Plan's principal office in Atlanta, from which it maintained all records and fielded all participant requests, and resolved all Plan-related disputes. Consistent with the historic practice, the PBGC continues to administer the Plan in Atlanta through its Field Benefit Administration (FBA) office, such that it has maintained the Plan's principal office in Atlanta since becoming the Plan's trustee in 2006. On information and belief, the Plan documents and records remain in this District and the PBGC personnel knowledgeable about the Plan's administration and responsible for handling participant inquiries about the Plan are based in this District. Every Plaintiff was informed of the PBGC's asset allocation and pension insurance decisions via a benefit determination letter, and on information and belief, each of these letters was prepared and signed by PBGC personnel in its Atlanta, Georgia FBA office, maintained by a PBGC contractor, Hammerman & Gainer, Inc.,

located at 1175 Peachtree Street NE, Atlanta, GA 30361. An example of such correspondence is attached hereto as Exhibit B. Additionally, for the last four years, as Plaintiffs have had questions or inquiries about the administration of their Plan, the PBGC has referred them to this same personnel in the Atlanta FBA office. *See, e.g.*, Enclosure 19 to the Appeals Board Decision (Exhibit H).

PARTIES

16. Plaintiffs are participants or beneficiaries in the Plan. Insofar as any Plaintiff is an estate, the decedent was a participant or beneficiary of the Plan. All Plaintiffs were adversely affected by the actions of the PBGC in determining benefits payable to Plaintiffs upon termination of the Plan and are accordingly eligible to bring suit for equitable and associated declaratory relief against the PBGC pursuant to 29 U.S.C. § 1303(f) or for the relief available under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. A complete list of all Plaintiffs is attached as Exhibit C.

17. Defendant PBGC is a wholly owned United States Government corporation within the Department of Labor, created to administer the mandatory government pension insurance program set forth in Title IV of ERISA, 29 U.S.C. §§ 1301 *et seq.* It became the trustee and thus the administrator of the Plan, as of December 31, 2006, pursuant to an agreement reached with the prior plan

administrator, Delta, though it had known long before that date that it would seek to become the Plan's trustee.

BACKGROUND

A. ERISA's Statutory Scheme For Protecting Retirees, and the PBGC's Subversion of that Scheme

18. The PBGC, as governmental insurer of pension plans, collects insurance premiums from employers on a regular basis and guarantees, through its insurance guarantee, the payment of all non-forfeitable (*i.e.*, vested) benefits. When a plan covered under Title IV of ERISA terminates with insufficient assets to satisfy its pension obligations with respect to its participants, the PBGC must pay benefits through the PBGC's insurance guarantee, up to a statutory maximum set forth in 29 U.S.C. § 1322(b)(3). These guaranteed benefits are paid from the PBGC's "revolving" fund, which is made up of the premium payments that the PBGC collects from pension plan sponsors. While Plaintiffs individually stand to lose hundreds of thousands of dollars in connection with the Plan's termination, the PBGC has determined that most or all are ineligible to receive *any* insurance guarantee payments. Put another way, despite the enormous losses that Plaintiffs have suffered in connection with their Plan's termination, the PBGC is not, by and large, paying them any insurance funds.

19. Pursuant to another provision in Title IV, plan participants in underfunded pension plans are entitled to have the assets of their plan allocated to fund their benefits, prior to any insurance determination. Under Title IV's asset allocation scheme, the plan administrator is to allocate a participant's benefits according to a six-tiered allocation scheme, consisting of priority categories 1-6 (referred to as PC1-PC6). *See* 29 U.S.C. § 1344 (the "Asset Allocation Statute"). The first two tiers, PC1 and PC2, are relatively rarely utilized, as they are reserved for benefits derived from participant contributions. Where, as here, no benefits occur in PC1 or PC2, PC3 is the highest priority category. PC3 benefits are reserved for those participants who were retirement-eligible at least three years prior to a plan's termination, under the plan provisions as they existed five years prior to plan termination. *See id.* § 1344(a)(3). ERISA provides these participants with the highest priority, and thus the most protection, since they are the ones that have no ability to make up shortfalls, given that they typically are no longer working.

20. ERISA requires that this asset allocation be performed by the plan's administrator; however, a trustee can take on the plan administrator's role upon its appointment. Like a plan administrator, a statutory trustee is a fiduciary under ERISA, 29 U.S.C. § 1342(d)(3), and is thus subject to ERISA's fiduciary duties,

which “are the ‘highest known to law.’” *Fuller v. SunTrust Banks, Inc.*, 744 F.3d 685, 695 (11th Cir. 2014) (citing *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003)). These fiduciary duties include the duties of loyalty and prudence, 29 U.S.C. § 1104(a), such that the fiduciary act with the care of a prudent person, and with “‘an eye single’ toward beneficiaries’ interests.” *Pegram v. Herdrich*, 530 U.S. 211, 235 (U.S. 2000) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982)).

21. While there is no requirement that the PBGC become the trustee (and in fact, ERISA’s legislative history suggests that Congress did not expect the PBGC customarily to fill this role), as a matter of practice the PBGC in most, if not all, cases seeks out the role, especially where a pension plan has substantial assets. It is significant in this regard that in its role as trustee, the PBGC then takes custody of remaining plan assets for deposit into its “trust” fund. “The distinction between the PBGC’s guarantor/trustee roles is particularly important with respect to the management of plan assets. As trustee, the PBGC must hold all plan assets, including assets recovered through litigation, in trust for the plan.” *Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326, 333 (4th Cir. 2007) (citing 29 U.S.C. § 1342(d)(1)(A)(ii)). However, unlike its “revolving” insurance fund, the PBGC’s trust fund is not regulated by Congress, and to the

extent that assets in the trust fund are not allocated for asset allocation payments, the PBGC uses those funds to finance its general “operational costs.”

22. While an underfunded plan’s assets are generally not sufficient to meet all of the long-term liabilities of the Plan when measured out over decades, the amounts the PBGC obtains -- and keeps -- in its role as trustee are often quite significant. For example, here the PBGC secured control of approximately \$3 *billion* in Plan assets and recoveries, which were placed into the PBGC’s trust fund. As of its last annual report, the PBGC had control of over \$60 billion in trustee plan assets. Because of the massive amount of funds under its control, the PBGC is able to earn extremely high investment returns, averaging approximately 9% over the last ten years. Just in 2013, the PBGC earned over \$2.7 *billion* in investment returns, and in the seven years (*i.e.*, the time it has been trustee of the Delta Pilots’ Plan) it has earned almost \$30 billion in investment returns. *See* PBGC 2013 Annual Report at 29.⁵

23. These investment returns, however, do not inure to the benefit of the participants; rather, a participant’s asset allocation is fixed, determined by reference to the plan administrator’s (or trustee’s) determination of that liability as of the date of a plan’s termination (using an unrealistically conservative assumed

⁵ <http://www.pbtc.gov/about/reports/ar2013.html> (Nov. 15, 2013).

rate of return that is almost always less than the PBGC's actual return on those assets). Thus, the PBGC, and not a plan's beneficiaries, enjoys the investment returns, which, as noted above, it uses to fund its operational expenses, with no practical oversight from Congress or the participants for whose benefit the assets were invested in the first place. While the PBGC is paying out some money from the trust fund to account for participant asset allocations, the investment returns in large plans with significant assets can outpace the expenditures, *especially where assets have been allocated to fund benefits of younger participants who will not begin their retirement (and thus not begin to draw on the trust fund account) for many years*. As a result, the PBGC has strong incentives to minimize and delay payments to participants from the trust fund, and to allocate assets away from retirement eligible participants towards younger participants, all in an effort to manipulate the asset allocation scheme in order to maximize investment returns on the trust fund and further its own financial wellbeing. This dynamic incentivizes the PBGC to make its benefit determinations with an eye toward favoring younger participants who are the farthest away from commencing their retirement benefits, so that the investment principal (upon which the PBGC earns interest) will remain undiluted for as long as possible. In the Delta Pilots' Plan it provided the PBGC

with a strong financial incentive to make impermissible and overly aggressive decisions in construing Plaintiffs' PC3 benefits.

24. In this case, Plaintiffs believe that the PBGC has improperly excluded benefits with a present-value of \$554 million (as of 2006) from the Plan's PC3 liability, subordinating these benefits behind those of younger Plan participants who have not yet begun to draw their retirement benefits from the Plan, and will not begin to do so for many years. As a result, the PBGC will be able to maximize the amount of time that the \$554 million in disputed funds can remain a pure source of interest-generation for the PBGC's own coffers, rather than having those funds pay actual retirement benefits.

25. The PBGC publishes interest rate returns on its trust account each year in its annual report. The chart below notes the trust fund's rate of return for each of the last seven years, along with the return the PBGC has realized *on just the disputed \$544 million in Plaintiffs' wrongfully denied PC3 benefits*.

	2007	2008	2009	2010	2011	2012	2013	2014
Rate of Return	9.50%	-11.80%	14.30%	11.60%	3.60%	15.50%	5.40%	9.30%
Investment Return (or loss)	\$ 52,659,643	\$ (71,622,658)	\$ 76,554,910	\$ 70,980,856	\$ 24,583,852	\$ 109,657,639	\$ 44,124,819	\$ 80,096,351.81
New Balance	\$ 606,971,677	\$ 535,349,019	\$ 611,903,929	\$ 682,884,785	\$ 707,468,637	\$ 817,126,276	\$ 861,251,095	\$ 941,347,446.57

26. Since 2007, the PBGC's trust fund has appreciated by almost \$400 million as a result of its decision to put the benefits of younger active pilots ahead of Plaintiffs' wrongfully-denied benefits.

B. The Delta Pilots' Plan

27. The Delta Pilots Retirement Plan, first adopted in 1972, and amended many times thereafter, is a tax qualified defined benefit pension plan, established pursuant to a series of collective bargaining agreements between Delta, and the Air Line Pilots Association (“ALPA”), the most recent example of which was the Pilot Working Agreement of 2001 (the “2001 PWA” or the “PWA”).⁶ The 2001 PWA defines and expands certain rights under the Plan, and is a Plan document under ERISA.

28. The Plan is a defined-benefit plan within the meaning of 29 U.S.C. § 1002(35), is an employee pension benefit plan within the meaning of 29 U.S.C. § 1002(2), and is subject to the coverage of ERISA pursuant to 29 U.S.C. § 1003(a).

29. Plaintiffs are participants and beneficiaries under the Plan, and were longtime Delta employees (or in some cases, spouses or executors of the employee's estate).

⁶ A copy of the Plan (and its amendments) is attached hereto as Enclosure 2 to the September 27, 2013 Appeals Board Decision (Ex. H), and a copy of the 2001 PWA is attached as Ex. D.

C. IRC Limits on Qualified Plan Benefits

30. After ERISA's enactment, in an effort to increase federal revenue, Congress implemented certain limits under the Internal Revenue Code ("IRC") affecting the amount of benefits that can be paid under tax-qualified retirement plans. Under § 401(a)(17) of the IRC (referred to herein as the "Compensation Limit"), limits are imposed upon the amount of compensation that a tax-qualified plan can use in determining pension benefits.⁷ Pursuant to IRC § 415(b) (referred to herein as the "Qualified Benefit Limit"), limits are imposed on the overall benefit that can be paid by a tax-qualified plan.

31. The limits have increased regularly since their inception, sometimes as the result of cost-of-living increases, and other times pursuant to Congressional

⁷ Prior to the Tax Reform Act of 1986 ("TRA '86"), there was no limit on the amount of compensation that could be taken into account under a qualified plan for purposes of benefit accruals or employer contributions, and the compensation limit under IRC § 401(a)(17) applied only with respect to contributions or benefits for employees who were self-employed or shareholder employees. This limit was deleted in 1982 by Pub. L. No. 97-248. TRA '86 added § 401(a)(17) to the IRC, placing a \$200,000 limit on the compensation that could be included in qualified plans. Section 401(a)(17)(B) provided for that amount to be adjusted annually for calendar years after 1989 for increases in the cost-of-living at the same time and in the same manner as under § 415(c). By 1993, the TRA '86 compensation limit was \$235,840. Congress then passed the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93"), Pub. L. No. 103-66, 104 Stat. 312, which reduced the § 401(a)(17) compensation limit to \$150,000, and altered the method by which the compensation limit was adjusted for changes in the cost of living. Pub. L. No. 103-66, § 13212, 107 Stat. at 471-73.

actions that make significant increases to the limits. Recognizing the effect that these provisions would have on Delta's pilots, Delta and ALPA formally agreed (in their collective bargaining agreements) that the Delta Pilots Plan would automatically incorporate any future increases in the Compensation and Qualified Benefit Limits. In June 2001, Congress again made a substantial increase to the limits in the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), increasing the Compensation Limit for plan years beginning in 2002 to \$200,000. *See* Pub. L. No. 107-16, § 611(c)(1), 115 Stat. 38, 97.

32. In order to align the Plan with these new limits, section 26 of the 2001 PWA (which was negotiated contemporaneously with EGTRRA's passage) expressly stated that, effective September 1, 2001, any increases to the limits under the Compensation Limit or the Qualified Benefit Limit would automatically be incorporated into the Delta Pilots' Plan as of the earliest legally permissible date. Thus, as of September 1, 2001, participants in the Plan had a legitimate expectation that their pension benefit would incorporate the increases to the IRC limits Congress had just enacted through EGTRRA, including the new \$200,000 Compensation Limit under IRC § 401(a)(17).

D. Delta's Bankruptcy and the Plan's Termination

33. In September 2005, Delta and eighteen of its subsidiaries filed voluntary petitions for Chapter 11 bankruptcy relief. *See In re Delta Air Lines, Inc.*, Case No. 05-17923 (S.D.N.Y. Bankr., filed Sept. 14, 2005). Once in bankruptcy, Delta ceased making contributions to the Plan and began negotiations with ALPA regarding the Plan's termination.

34. The negotiations between Delta and ALPA culminated in Letter of Agreement #51 ("LOA #51"), pursuant to which ALPA agreed it would not oppose the Plan's termination, in return for which ALPA would receive \$650 million in notes and a \$2.1 billion allowed general non-priority unsecured claim under Section 502 of the Bankruptcy Code, which Delta and ALPA intended to be used to "replace unfunded benefits under the Pilots Plan by using the proceeds to fund follow-on retirement plans and other payments or distributions to [active] pilots." *See* Ex. A, PBGC Objection at 2.

35. When Delta sought the bankruptcy court's permission to enter into LOA #51, the PBGC vociferously objected, arguing that the agreement was "designed in substantial part to skirt [ERISA's] safeguards." *Id.* at 14. Among the objections noted by the PBGC were: (1) the arrangement improperly allowed funds which should properly go to the PBGC in connection with ERISA's priority

allocation scheme to leave the control of the plan sponsor/control group and thereby to fund pension benefits outside of ERISA's asset allocation scheme; and (2) it provided for an "abusive" follow-on pension benefit arrangement.⁸ *See id.* at 14-15. In essence, LOA #51 would allow Delta and ALPA to turn the asset allocation scheme on its head, putting younger active workers to the front of the line while relegating retirees living on a fixed-income to the back.

36. The bankruptcy court approved LOA #51 over the PBGC's objections, and the PBGC appealed the ruling to the district court.

37. Delta issued a notice of intent to terminate the Plan on June 19, 2006, and filed a motion to terminate the Plan on August 4, 2006 in its bankruptcy proceedings. In the meantime, the PBGC and Delta entered into negotiations that would allow for the Plan's termination.

38. On September 5, 2006, the bankruptcy court approved Delta's termination motion, finding that the debtors had satisfied the statutory criteria for a distress termination of the Plan under ERISA § 4041(c) (29 U.S.C. § 1341).

39. On December 4, 2006, the PBGC and Delta executed a settlement agreement resolving the PBGC's claims relating to the Plan. The settlement

⁸ Abusive follow-on plans "tend to frustrate" ERISA's objectives and are contrary to well-established PBGC policy. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 651 (1990).

agreement resolved all of the PBGC's claims against Delta, including its claim for \$2.989 billion in unfunded benefit liabilities, as well as its rights to restore the Plan under ERISA § 4047, 29 U.S.C. § 1347.⁹ The PBGC received \$225 million in notes, and a \$2.2 billion unsecured bankruptcy claim. In return the PBGC agreed to withdraw its pending appeal of the bankruptcy court's order approving LOA #51, and the parties agreed to execute a termination and trusteeship agreement.

40. On December 15, 2006, notwithstanding its earlier objections to Delta's actions, the PBGC notified Delta that the PBGC had determined that Delta met ERISA's criteria for a distress termination.

41. On December 20, 2006, the bankruptcy court approved the settlement agreement between the PBGC and Delta. Pursuant to the terms of the agreement the PBGC withdrew its appeal of the court's ruling as to LOA#51, the Plan was retroactively terminated as of *September 2, 2006* (the "date of plan termination" or "DOPT"), and the PBGC became the Plan's trustee as of December 31, 2006.

⁹ Pursuant to ERISA § 4047, Congress authorized the PBGC to "take whatever action is necessary" to restore terminated pension plans to their pre-termination status in cases where the PBGC later determines that the plan sponsor could afford to maintain the terminated plan. 29 U.S.C. § 1347.

E. The PBGC's Trusteeship

42. Upon becoming the Plan's trustee, the PBGC took control of the Plan's assets, which the PBGC valued initially at approximately \$1.984 billion as of the date of the Plan's termination.¹⁰

43. As trustee, the PBGC by statute was tasked with the obligations otherwise owed by the Plan's plan administrator. *See* 29 U.S.C. § 1342(d)(1)(A)(i). In this respect, the PBGC had a responsibility to determine the amount of liabilities in each of the six priority categories. The PBGC determined that the Plan's PC3 liabilities were, in present dollar value, approximately \$2.13 billion (such that PC3 liabilities were 93% funded by the Plan's assets).

44. The PBGC then calculated the liabilities in Priority Category 4 ("PC4"), which are all guaranteed benefits (*i.e.*, benefits covered by the PBGC's insurance guarantee) not included in PC1 through PC3. The PBGC determined the present value (as of DOPT) of PC4 liabilities was \$761,904,660. Unlike Plaintiffs' PC3 benefits, the PBGC is responsible for paying PC4 liabilities out of its revolving insurance fund, rather than through Plan assets.

¹⁰ The PBGC has since acknowledged that its initial valuation efforts were flawed, and in 2013 hired a public accounting firm to undertake a plan asset re-evaluation for the Delta Pilots' Plan.

45. As described above, the PBGC obtained additional recoveries from Delta, which the PBGC initially valued as being worth \$1,279,506,423, as of the date of Plan termination. Under ERISA § 4022(c), 29 U.S.C. § 1322(c), the PBGC is required to pay out a set ratio of these recoveries to Plan participants. However, by placing benefits of active pilots (not yet in pay status) ahead of PC3 retirees (already in pay status) the PBGC was able to corrupt the statutory recovery ratio by ensuring that hundreds of millions of dollars remained, undiluted, within the agency's trust fund in order to maximize the PBGC's investment returns.

46. After the Plan's termination and trusteeship in 2006, the PBGC began paying estimated benefits under the Plan. Those benefits were significantly less than the vested pension benefits the Pilots had been entitled to receive under the Plan and ERISA. Nonetheless, the PBGC maintained that Plan participants were unable to challenge those benefit determinations until the PBGC issued its final benefit determinations.

47. Finally, beginning around May 2010 (almost four years after the Plan's termination), and largely (though not entirely) concluding in the end of 2012, the PBGC began mailing final benefit determination letters to Plan participants, informing them of the PBGC's final determinations (as insurer and

trustee) of any guarantee funds they were entitled to under ERISA § 4022, any asset allocation payments they were entitled to under ERISA § 4044, and any recovery allocation they were entitled to under ERISA § 4022(c).¹¹

48. As a general matter, the benefit determination letters produced by the PBGC offer participants no meaningful information about the logic behind the PBGC's benefit determinations, the calculations relied upon in making the determinations, or the information underlying the calculations.

49. Each Plaintiff was given just 45 days to appeal the benefit determination, notwithstanding the fact that the PBGC took four years (or more in some cases) to issue these determinations, and despite the fact that the determination letters failed to provide the participants with the information necessary to present an informed appeal. *See, e.g.*, Ex. B (stating 45-day appeal window).

¹¹ ERISA § 4022(c) requires that the PBGC provide a specific amount of that recovery to pay benefits under the Plan, pursuant to a specified recovery ratio. Under the recovery ratio, the PBGC determined the 4022(c) amount to be \$681,259,882, of which the PBGC applied \$111,795,637 to fund the remainder of PC3, and the remaining \$569,464,245 to fund PC5(a). *See* Exhibit E, Actuarial Case Memo at 31. The vast majority of PC5(a) funds are enjoyed by active participants who receive guaranteed funds (that is the "PC4 pilots") by a ratio of about 9 to 1. *See id.* at 1 (noting that active participants have been allocated \$517 million of the 4022(c) payments).

50. Plaintiffs retained counsel, and contacted the PBGC's Appeals Board, which is the entity that hears appeals of PBGC final benefit determinations, to discuss a process for undertaking a consolidated joint appeal on their behalf.¹² The PBGC Appeals Board and Plaintiffs reached an agreement that the joint appeal would not be due until all of the Delta Pilots' Plan benefit determination letters had been issued, and until Plaintiffs were provided with further information to understand the basis for the PBGC's determinations.

51. Because the benefit determinations were being issued on a random rolling process, Plaintiffs were concerned that some Pilots might miss the PBGC's 45-day deadline. In May 2010, Plaintiffs provided the PBGC with a list of the Plan participants who wanted to extend their 45-day deadline in order to review the PBGC's determinations and responses to the information requests, and who wished to take part in any consolidated appeal. Plaintiffs' attorneys also requested that the PBGC provide the listed participants with all the information on which the PBGC relied in making its benefit determinations. The PBGC, (again in its role as Plan fiduciary) refused the request, and insisted that it would not recognize any extension request, or request for supplemental information, until its own internal

¹² The PBGC's Appeals Board is a part of the PBGC's legal function, reporting to the agency's General Counsel. The Appeals Board routinely consults with the agency's litigation attorneys in resolving pending administrative appeals.

records confirmed that a final benefit determination had issued. It then enthusiastically engaged in issuing “gotcha” denials for retirees who failed to meet the PBGC’s 45-day deadline, regardless of whether they were on the list of participants stating their intention to exercise their appeal rights, and regardless of the fact that the PBGC would not provide them the most basic information about their benefit determinations for a matter of years. Consequently, over 300 Plan participants who appealed the PBGC’s determinations were later deemed “untimely,” many missing the PBGC’s arbitrary 45-day deadline by a matter of days.¹³

52. Plaintiffs proceeded to attempt to gain the pension records and data necessary to research and file an informed consolidated appeal through information requests directed to the PBGC Appeals Board and Disclosure Office. The PBGC engaged in a variety of conduct to withhold the information from the Plan’s participants, arguing both that it lacked the ability to process this basic

¹³ The PBGC ultimately reversed its “untimely” designation for some Plaintiffs who satisfied the PBGC’s “good cause” criteria. That said, more than 300 Plaintiffs submitted a good cause request submission to the PBGC’s Appeals Board, even offering to make an evidentiary showing at a hearing before the Appeals Board as to why their failure to meet the 45-day deadline should be excused. The Appeals Board denied both requests, refusing even to bother itself with the trouble of a hearing. *See* Ex. F, Correspondence with PBGC Appeals Board.

information request in a timely fashion, and seeking to charge Plaintiffs exorbitant fees for access to it, in direct contravention of the Privacy Act and the PBGC's responsibilities as a Plan fiduciary.

53. In October 2011, the PBGC still had only produced a fraction of the participant information requested. However, given that more than five years had passed since their Plan's termination, and being unwilling to allow the PBGC to drag out the appeal process further, a group of 1,784 participants (most of whom are Plaintiffs in this action), filed a consolidated appeal of the PBGC's benefit determinations under the Plan. *See* Exhibit G.

54. On September 27, 2013 – nearly two years after the filing of the consolidated appeal – the PBGC Appeals Board resolved Plaintiffs' claims, and decreed that it had taken final agency action with respect to the vast majority of Plaintiffs. A copy of the PBGC's September 27, 2013 decision (with redactions) is attached to this Complaint as Exhibit H.

55. In its final decision, the PBGC Appeals Board rejected all significant grounds for appeal raised by the Pilots. In the end, the PBGC, through an arbitrary, unfair, and self-interested reading of the Plan's terms and ERISA, whittled Plaintiffs' benefits claims down so far that the limited funding remaining in this Plan – which had been *terminated for distress* – was (according to the

PBGC) sufficient to cover the bulk of what the PBGC characterized as Plaintiffs' non-forfeitable benefits. And the PBGC then paid nothing further. While the Pilots would receive just a fraction of the pension benefits on which they had relied for a lifetime, the PBGC paid them not a single dollar from its insurance funds.

56. The benefits paid to Plaintiffs subsequent to the termination of the Plan are less than required under the terms of the Plan and under ERISA. Many Plaintiffs find themselves experiencing financial hardship as a result of the decreased pension payments provided by the PBGC.

57. Having now fully exhausted their administrative remedies, Plaintiffs come to this Court seeking injunctive and other appropriate equitable relief, as well as associated declaratory relief, sufficient to redress violations of and to enforce ERISA. Plaintiffs have been adversely affected by PBGC determinations, as trustee, with respect to the categorization and distribution of Plan assets under ERISA § 4044, 29 U.S.C. § 1344. Plaintiffs have also been adversely affected by the PBGC's breach of fiduciary duties owed to Plaintiffs under ERISA §§ 404 and 4042, 29 U.S.C. §§ 1104 and 1342, to the extent that the PBGC has unjustly enriched itself with Plan assets at Plaintiffs' expense. And Plaintiffs have also been adversely affected by the PBGC's improper failure to ensure, as guarantor,

payment of all non-forfeitable benefits and Plan recoveries, in violation of its statutory obligation under ERISA § 4022(a) and (c), 29 U.S.C. § 1322(a) and (c). Moreover, Plaintiffs seek reasonable attorney fees and other expenses and costs pursuant to ERISA § 4003(f), 29 U.S.C. § 1303(f)(3).

58. Plaintiffs additionally pursue their claims under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.* By failing properly to distribute remaining Plan assets and recoveries, by administering its appeals process in a manner that denies participants a meaningful opportunity to appeal the PBGC’s benefit determinations, and by relying on regulations that are inconsistent with ERISA in taking these actions, the PBGC has engaged in action that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706. All of Plaintiffs’ claims raised under ERISA are accordingly also subject to redress under the APA.

59. Plaintiffs also seek attorney’s fees under the Equal Access to Justice Act, 5 U.S.C. § 504(a).

EXHAUSTION OF REMEDIES

60. Most of Plaintiffs in this lawsuit filed timely appeals to the PBGC Appeals Board, challenging the adverse benefits determinations made by the PBGC.

61. The PBGC Appeals Board's September 27, 2013 decision (Exhibit H) resolved the consolidated appeal brought by approximately 1,800 participants in the Delta Pilots' Plan. All Plaintiffs in this action participated in the consolidated appeal, and the PBGC's decision resolved finally all of the questions presented in this lawsuit that were within the authority of the PBGC Appeals Board to resolve.

62. While all Plaintiffs appealed the PBGC's benefit determinations, the PBGC dismissed the administrative appeal of approximately 300 Plaintiffs on the ground that their appeal was supposedly untimely. Yet, the PBGC had not provided adequate information regarding the final benefit determinations within the PBGC's forty-five day appeal deadline, so that these Plaintiffs could determine whether to appeal, or exercise a meaningful right to appeal. The PBGC, as a result, may not assert that these Plaintiffs have failed timely to exhaust.

CLAIMS FOR RELIEF

Claim One

(Failure to Comply With ERISA -- Improper Categorization of Priority of Plan Provision Adopting 401(a)(17) Limit Approved By Congress)

63. Each and every allegation in this Complaint is incorporated into this claim for relief.

64. This claim stems from the PBGC's actions (as the Plan's trustee) in allocating the Plan's assets in Plan benefit payments.

65. As noted above, terminated underfunded plans – that is, those with insufficient assets to pay all benefits – shall have their assets allocated among the plan's participants and beneficiaries pursuant to a priority scheme established by Congress. This allocation is to be accomplished by a fiduciary, either the plan's existing administrator, or by an appointed statutory trustee.

66. As also noted above, Congress did not envision that the PBGC would become the trustee in all plan terminations. Moreover, ERISA fiduciaries have an obligation to remove themselves as trustees where there is even the potential for a conflict of interest. Nonetheless, as a matter of practice the PBGC always seeks to act as trustee for terminated plans with substantial assets. It is significant in this regard that the PBGC, by becoming trustee, then acquires complete control over whatever assets remain in the terminated Plan. The PBGC was charged here with

allocating approximately \$3 billion in Plan assets and recoveries. As for the Plan assets, the PBGC had responsibility, as trustee, to allocate those assets pursuant to the Asset Allocation Statute, Section 4044 of ERISA, 29 U.S.C. § 1344, which sets out the order in which the Plan's statutory trustee (here the PBGC) is to allocate Plan assets to the participants by establishing various priority categories.

67. The PBGC's determination as to whether a Plan benefit is within PC3 is critical to determining whether the Plan's retirement-eligible participants will receive something close to the retirement benefits they earned through their years of service. Because of its conflict of interest, the PBGC has strong incentives to exclude long-standing benefits from PC3 so it can spread out the assets of the Plan among more participants, particularly those participants in the other priority categories who are further away from retirement. While this allows the PBGC to hold onto the (growing) Plan assets for as long as possible, it undermines the intent of ERISA to protect existing retirees who have fewer available options to recover lost retirement funds. Construing PC3 fairly, by including more long-standing benefits for retired and retirement-eligible participants, would force the PBGC actually to use the assets for the benefit of the Plan's participants, and prevent the PBGC from making benefit determinations designed to hold on to Plan assets for as long as possible so as to profit from the investment return on

assets that occurs between the time the PBGC acquires the assets and the time it actually pays benefits.

68. PC3 benefits are defined as follows:

(3) Third, in the case of benefits payable as an annuity –

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

29 U.S.C. § 1344(a)(3).

69. Breaking this statutory language down, subparagraph A deals with individuals who were actually retired three years prior to a plan's termination, while subparagraph B deals with those individuals who were retirement-eligible.

Taking the two subparagraphs together, a participant's benefit will be in PC3 if the participant either had retired, or was eligible to retire and have benefits in "pay status," as of three years prior to a plan's termination, "based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least." Thus, there are two components to determining whether a benefit under the Delta Pilots' Plan is in PC3. The first component is determining whether a participant was eligible to enter "pay status" (*i.e.*, retire) as of September 2, 2003 (*i.e.*, three years prior to the Plan's termination date). The second component is then determining, for those participants who meet the three-year "pay status" requirement, what is the benefit they were entitled to in those last three years, based on the *provisions of the Plan* in effect during the five years prior to termination that produce the lowest benefit.

70. On June 7, 2001, Congress passed a law that amended IRC § 401(a)(17), by raising the amount of compensation that could be permissibly used to calculate a qualified pension benefit – *i.e.*, by raising the Compensation Limit. The Pilots have consistently argued that this Congressional action, which occurred in 2001 (more than 5 years before Plan termination), should be honored in calculating a PC3 participant's pension benefit. Again, ERISA instructs a statutory trustee to include within PC3 those benefits owed to participants who

either did retire, or who could have retired, as of three years prior to Plan termination “based on *provisions of the plan* (as in effect during the 5-year period ending on [the date of plan termination]) under which such benefit would be the least.” 29 U.S.C. § 1344(a)(3)(A) (emphasis added).

71. Accordingly, if a plan provision was “in effect,” unchanged, during the entirety of the five-year period prior to the date of plan termination, then that provision must be used to calculate a participant’s PC3 benefits. As applied to this case, this means that if a Plan provision was “in effect” five years before the Plan’s September 2, 2006 termination date – that is, as of September 2, 2001 (DOPT minus five years or “DOPT-5”) – and was not amended during the ensuing five years, then it must be included in PC3. Acting as Plan trustee, the PBGC has taken the position that it can ignore this Congressional increase to the Compensation Limit because (despite occurring 5 years before Plan termination) it supposedly still came too late. The PBGC’s decision to disregard the post-EGTRRA Compensation Limit in calculating PC3 benefits was unlawful.

72. At the time it was allocating assets, the PBGC had two options under the Asset Allocation Statute in how to view Congress’ 2001 increase of the Compensation Limit. First, it could have focused its inquiry on the Congressional action itself, given that this was a new Congressional mandate applicable to *all*

pension plans, not just the Delta Pilots' Plan, that was designed to increase the Compensation Limit for all American workers, not subject to ERISA's five-year look back provision because it resulted from an act of Congress, not by operation of a Plan amendment. *See Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133 (D.C. Cir. 1983). Plaintiffs submit that this first option was the best one, since it focuses on the fact the change in the Compensation Limit under the Plan resulted ultimately from a change *in law*, and thus should not be subject to the five-year "effectiveness" inquiry, which Congress reserved for changes implemented by a plan sponsor to its particular pension plan, rather than a federal mandate applicable to all pension plans nationally. But the PBGC rejected this option, presumably because it would have resulted in greater asset allocations to older Plan participants (to the detriment of the PBGC's investment returns). The PBGC's actions were unlawful for this reason alone.

73. The PBGC's other option was to focus its inquiry on the provisions of the pension plan in question (here, the Delta Pilots' Plan), in order to determine if and when the Plan was amended to reflect EGTRRA's increase to the Compensation Limit. Under this analysis, the operative question under the Asset Allocation Statute is whether the amendment occurred more than five years before Plan termination. The PBGC ostensibly adopted this Plan-centric analysis, but,

contrary to the statutory language, ignored the “effective” date of the Plan provision (September 1, 2001) and focused on the “payable” date, which it argued came too late for inclusion in PC3. This construction is impermissible because it contradicts the plain language of the statute. Indeed, PC3 has another provision that expressly deals with the amount of time that a benefit must have been eligible for “pay status” – and the statute sets that time at three years. By demanding that the benefit be “payable” for a five-year period before Plan termination, the PBGC impermissibly replaced Congress’s three-year period with its own requirement that a benefit be eligible to be in “pay status” for a five-year period.

74. The PBGC’s own regulations contradict the PBGC’s PC3 determination. PBGC regulations state that a plan provision is “in effect” “on the later of the date on which it is adopted or the date it becomes effective.” 29 C.F.R. § 4044.13(b)(6).

75. Taking either the date on which it was adopted or became effective, the amendment that incorporated EGTRRA’s increase to the § 401(a)(17) limit was “in effect” prior to September 2, 2001 (*i.e.*, more than five years prior to the Plan’s termination).

76. Congress passed EGTRRA on June 7, 2001, which raised the cap on the Compensation Limit from \$150,000 to \$200,000 for plan years beginning after December 31, 2001. Pub. L. No. 107-16, § 611(c)(1), 115 Stat. 38, 97.

77. At the time of EGTRRA's passage, section 1.12 of the Delta Pilots' Plan capped earnings during a plan year to the pre-EGTRRA \$150,000 limit (plus any additional cost-of-living increases).

78. In order to align the Plan with the Compensation Limit as increased by EGTRRA, Delta and ALPA entered into a new collective bargaining agreement (the 2001 PWA) on June 21, 2001. The PBGC concedes both that the 2001 PWA amended the Plan and that it was adopted on June 21, 2001 (more than five years prior to the Plan's termination).

79. Section 26(G) of the PWA (the "EGTRRA Amendment") (Exhibit D at 281-92) expressly incorporated into the Plan any increases to the Compensation Limit resulting from congressional amendments to § 401(a)(17), such as the one brought about by EGTRRA. It states:

If Internal Revenue Code Section 401(a)(17), 415(b), or 415(c) (the "Qualified Plan Limits") are amended to increase the limitations therein, then any such increase will be effective for the Retirement Plan, MPPP and Savings Plan as of the earliest date that the increased Qualified Plan Limits could have become legally effective for that Plan, had that Plan not been collectively bargained, or, in the case of the Savings Plan, had pilot participation in that Plan not been collectively bargained.

Ex. D, 2001 PWA at 283.

80. The 2001 PWA provides that “the modifications in *Section 26* will be effective on September 1, 2001.” *Id.* at 281 (italics in original). Thus, no later than September 1, 2001, the Plan’s participants and their beneficiaries had a justifiable expectation that they would be entitled to have their pension benefits calculated using EGTRRA’s increased IRC limits.

81. Because the EGTRRA Amendment was both adopted and effective prior to DOPT-5 (*i.e.*, September 2, 2001), any benefits resulting therefrom must be included within PC3 for any participant who could have begun receiving those benefits at least three years prior to the Plan’s termination.

82. The PBGC’s decision to disregard the EGTRRA Amendment’s specified effective date is contrary both to ERISA, the PBGC’s own regulations, and to guidance promulgated by the IRS regarding EGTRRA’s implementation. ERISA accords PC3 status to the “provisions of the plan” that were “in effect” during the 5-year pre-termination period. *See* 29 U.S.C. § 1344(a)(3)(A). By its plain language, the statute focuses squarely on when the *provisions of the plan* are in effect – not on when the *benefit itself* was first operative or receivable. The PBGC’s regulation likewise defines “in effect” in relation to the plan provisions. It states that “*a plan or amendment* is ‘in effect’ on the later of the date on which

it is adopted or the date it becomes effective.” 29 C.F.R. § 4044.13(b)(6) (emphasis added). The Plan provision in question here, the EGTRRA Amendment, says simply that any Congressionally imposed increases to the Compensation Limit shall apply to the Plan. The effective date of this provision is explicitly set out in the 2001 PWA, which states that the modifications in the section of the PWA containing the EGTRRA Amendment “will be effective on September 1, 2001.” But instead of simply looking to the stated effective date of the Plan provision, as its regulation instructs, the PBGC impermissibly derived the effective date by looking outside the Plan to the terms of EGTRRA itself.

83. Even if it were somehow appropriate to disregard the stated and actual effective dates of the EGTRRA Amendment and instead equate its effective date with the first day of the earliest plan year to which the increased Compensation Limit could have applied, it still would have been inappropriate to exclude the increased § 401(a)(17) limit from Plaintiffs’ PC3 benefits. The PBGC in fact conceded this point in an internal memo. *See* Ex. I, Memo from J. Armbruster and J. Krettek to N. Williams and S. Strassman at 6 (July 3, 2007). In this memo, the PBGC’s Office of Chief Counsel (“OCC”) notes that, under relevant IRS guidance, plans could apply EGTRRA’s increased Compensation Limit to plan years prior to January 1, 2002: “After Congress enacted EGTRRA, the IRS stated

that a plan using a final average pay formula may apply the increased [26 U.S.C.]

§ 401(a)(17) limit as follows:

In the case of a plan that uses annual compensation for periods prior to the first plan year beginning on or after January 1, 2002, to determine accruals or allocations for a plan year beginning on or after January 1, 2002, the plan is permitted to provide that the \$200,000 compensation limit applies to annual compensation for such periods in determining such accruals or allocations.

Id. at 6 (quoting IRS Notice 2001-56, [2001-2 C.B. 277, 277]). Hence, “[i]n determining such post-2001 accruals in the case of a plan that uses a final average earnings formula, the plan may apply a \$200,000 limit to earnings from years prior to 2002.” *Id.* at 7.

84. Because the Delta Pilots’ Plan “uses a final average earnings formula” to calculate Plan benefits, it thus was permitted to apply EGTRRA’s increased Compensation Limit to plan years prior to 2002. That formula is based on the highest average earnings for *any* consecutive 36-month period in which a participant has earnings. *See* Enclosure 2 to Ex. H., Delta Pilots’ Plan § 1.17.

85. For many of the Pilots in PC3 – that is, pilots who either were retired, or who could have retired, as of September 2, 2003 (three years prior to the plan’s termination date) – the 36-month period that comprises their highest earnings will include a plan year “prior to the first plan year beginning on or after January 1, 2002.” IRS Notice 2001-56, 2001-2 C.B. at 277. For the Delta Pilots’ Plan, all

Plan years “prior to the first plan year beginning on or after January 1, 2002,” – the earliest of which is the one that began on July 1, 2001 – necessarily began more than five years before the Plan’s September 2, 2006 termination date. Moreover, under the terms of section 26(G) of the 2001 PWA (which the PBGC has agreed is a controlling Plan amendment), the Plan was obligated to make increases to the Compensation Limit “effective” “as of the earliest date that the increased Qualified Plan Limits could have become legally effective for that Plan.” As result, even under the PBGC’s erroneous decision to define a provision as “effective” when a benefit thereunder is “payable,” EGTRRA’s Compensation Limit was “effective” prior to DOPT-5 and must be used in calculating Plaintiffs’ PC3 benefits.

86. The ramifications of this exclusion are significant. For the older Pilots that retired after EGTRRA’s passage, the PBGC’s decision to allocate benefits according to the pre-EGTRRA Compensation limit is particularly painful.

87. For example, consider a Plan participant that retired at age 60 in August 2002, after thirty years of piloting planes for Delta. Not surprisingly, Delta calculated his pension benefit in accordance with the 2001 PWA using EGTRRA’s \$200,000 Compensation Limit, such that he would have received approximately \$3,584 per month from the Plan from the time of his retirement in

2002. After the PBGC assumed control of the Plan's assets years later, it determined that it could reduce the Plan's PC3 liability by over \$421 million by characterizing the pension payments attributable to the increased Compensation Limit announced in EGTRRA (and promised by the 2001 PWA) as a Plan benefit that became effective less than five years prior to Plan termination. The PBGC then cut this Pilot's annuity benefit almost in half, reducing his monthly pension benefit from the Plan from \$3,584 to \$1,917.

88. By recasting these funds as being outside of PC3, the PBGC is able to place them in the back of the line, and allocate (or promise) those funds to benefits of younger pilots who have not yet begun retirement (some of whom will not, in fact, begin retirement until 2025). In the meantime, instead of funding the pension of an actual Plan participant struggling with the uncertainty of retirement, this \$421 million sits, undiluted, in the PBGC's trust account, earning the PBGC massive amounts of investment income.

89. The PBGC also erred in excluding cost of living adjustments ("COLAs") to the Compensation Limit for the years 2004, 2005 and 2006. Under § 401(a)(17)(B), the Treasury Department is required to make annual cost of living adjustments to the Compensation Limit. The Compensation Limit was increased to \$205,000, in 2004, \$210,000 in 2005, and \$220,000 in 2006. Section

1.12 of the Delta Pilots' Plan expressly incorporated these cost-of-living adjustments such as to make them effective as of the earliest legally permissible date. The PBGC nevertheless improperly excluded these COLAs from PC3.

90. Because Congress's annual cost-of-living adjustments to the § 401(a)(17) limit are not properly construed as "automatic increases in the benefit formula," the PBGC's decision to exclude these COLAs on such ground was erroneous. *See* Ex. H, Appeals Board Dec. at 21-22. The Delta Pilots' Plan's "benefit formula" is contained in section 5.01, and is based on the ratio of a participant's credited service to 25 years times 60% of his final average earnings. The Plan's incorporation of the Compensation Limit, as adjusted for any COLAs, is contained in an entirely separate section, section 1.12, and is not part of the "benefit formula."

91. And far from increasing benefits, the Compensation Limit operates to restrict benefits by capping the amount of compensation that can be used to determine a participant's retirement benefit, with the yearly COLAs merely easing that limitation. *See* Enclosure 2 to Ex. H, Delta Pilots' Plan § 1.12 ("the Plan must *limit* Earnings during a Plan Year . . . to \$150,000, as adjusted for the cost-of-living in accordance with Section 401(a)(17)(B) of the Code.") (emphasis added). Still further, even if the Compensation Limit COLAs could be construed

as conferring a benefit “increase,” any such increase is certainly not “automatic”: if a participant earns an amount that is less than or equal to the Compensation Limit, any subsequent COLA does not affect that participant’s benefits whatsoever, let alone “increase” his or her benefit.

92. The PBGC’s interpretation and application of the statute is also unreasonable in light of the policies that underlie 29 U.S.C. § 1344 and is inconsistent with the underlying statutory scheme. Congress imposed its five-year look-back as a way of protecting against abuse of the pension system. Where a plan sponsor intended to seek a plan’s termination, Congress wanted to find a way to protect the asset allocation scheme, and the participants in that scheme, against pension benefit increases enacted at the last minute for which the employer had no means (or intention) of funding. ERISA therefore requires that a benefit not be afforded PC3 status unless the plan provision on which it is based was in effect for at least five years prior to the plan’s termination. By focusing on the time when a plan provision is effective, Congress linked the PC3 determination to the employer/sponsor’s action, because it is of course the sponsor that exercises control over when any plan provision is adopted and becomes effective. By ignoring the statutory language and instead utilizing the date the increased benefit was “payable,” the PBGC chose a date that is not only inconsistent with the

statutory language but inconsistent with the purpose of the underlying statutory scheme as well, especially given that the Compensation Limits were not even in existence when ERISA was passed in 1974.

Claim Two

(Failure to Comply With ERISA -- Improper Exclusion of Plan Provision Adopting Congressional Increases to § 415(b) Qualified Benefit Limit From PC3)

93. Each and every allegation in this Complaint is incorporated into this claim for relief.

94. Closely related to IRC § 401(a)(17) limit (again, the Compensation Limit) is the limit imposed by IRC § 415(b) – *i.e.*, the Qualified Benefit Limit. Whereas the Compensation Limit restricts the amount of earnings that a tax-qualified plan can take into account for purposes of benefit accruals, § 415(b) caps the amount of benefits that a tax-qualified plan can pay out to an individual participant in a given year. When Congress increased the Compensation Limit in EGTRRA, it also increased the Qualified Benefit Limit. Accordingly, the same section of the 2001 PWA that incorporated into the Plan the increased Compensation Limit (Section 26(G)) also incorporated the increased Qualified Benefit Limit.

95. This claim challenges the PBGC's determination that the Congressionally-mandated change to the Qualified Benefit Limit did not fall

within PC3. Although this limit stemmed from the same Congressional action as the Compensation Limit, and was implemented by the same Plan provision, the PBGC's analysis of whether the Qualified Benefit Limit fell within PC3 came to a contrary conclusion as for the Compensation Limit. In both instances, the PBGC incorrectly determined that these Congressionally-mandated actions were Plan amendments subject to the ERISA's five-year look-back requirement; however, unlike with the Compensation Limit increase, the PBGC deemed the Qualified Benefit Limit increase both adopted and effective prior to DOPT-5, and thus within PC3, but only applied this rule to Pilots who were *active* at the time the Plan amendment was signed. For the Pilots who were retired at the time, the PBGC deemed the provisions of the 2001 PWA inapplicable, and instead applied the lower, pre-EGTRRA Qualified Benefit Limit.

96. The PBGC's decision was erroneous. Even assuming *arguendo* that it was proper to deem Congress's Qualified Benefit Limit increase as a Plan amendment, *that* amendment was in effect more than five years before Plan termination for everyone, not just for the then-active pilots. The PBGC also erred in excluding the Congressional cost-of-living adjustments to the Qualified Benefit Limit.

A. The PWA Amended the Plan to Incorporate the Increased § 415(b) Limit for Both Active and Retired Pilots

97. Prior to EGTRRA, the Qualified Benefit Limit on annual benefits under defined benefit plans was \$90,000, including any COLAs made under Treasury Department regulations. By January 1, 2001, the Qualified Benefit Limit, as increased by COLAs, was \$140,000. This limit was incorporated into the Delta Pilots' Plan by Section 12.11(a)(i)(A). When it passed EGTRRA on June 7, 2001, Congress increased the Qualified Benefit Limit from \$90,000 to \$160,000. But unlike EGTRRA's increase to the Compensation Limit, which applies to plan years *beginning* after December 31, 2001, the Qualified Benefit Limit increase applied to plan years *ending* after December 31, 2001.

98. As with EGTRRA's change to the Compensation Limit, the PBGC should also have treated the change to the Qualified Benefit Limit as a change in law not subject to the five-year "effectiveness inquiry," which Congress reserved for changes implemented by a plan sponsor to its particular pension plan, rather than a mandate imposed by Congress itself, applicable to all pension plans nationally. But the PBGC rejected this option, presumably because it would have resulted in greater asset allocations to older plan participants (to the detriment of the PBGC's investment returns). The PBGC's actions were unlawful for this reason alone.

99. The PBGC's other option was to focus its inquiry on the provisions of the pension plan in question (here, the Delta Pilots' Plan), in order to determine if and when the Plan was amended to reflect EGTRRA's increase to the Qualified Benefit Limit. Under this analysis, the operative question under the Asset Allocation Statute is whether the amendment occurred more than 5 years before Plan termination. The PBGC ostensibly adopted this Plan-centric analysis, but oddly (and unlawfully), focused its analysis on the terms of the Congressional statute in determining when this Plan provision went into "effect," using the earliest date EGTRAA specified that the new Qualified Benefit Limit could apply (July 2001).

100. Delta and the Pilots incorporated the increased Qualified Benefit Limit in the same section of the PWA (Section 26(G)) that incorporated the Compensation Limit increase. The PBGC deemed this to be an amendment to the Plan, and (as with the Compensation Limit) measured the effectiveness of the provision under its extra-statutory (and erroneous) "payable" analysis. But, notwithstanding that the same Plan provision incorporated EGTRRA's increases to the Compensation Limit and the Qualified Benefit Limit, the PBGC reached a different conclusion here, including the § 415(b) limit increase in PC3 for some of the PC3-eligible participants, while excluding it for others. Specifically, the

PBGC decided that Section 26(G) of the PWA “exclusively” applied only to active (*i.e.*, younger) participants, because they were the only participants whom the PBGC was sure were represented by ALPA at the time that the 2001 PWA was signed.

101. Contrary to the PBGC’s conclusions, the language of Section 26(G) of the 2001 PWA plainly amends the Plan as a whole, and nothing in the actual language of section 26(G) can reasonably be read to support the PBGC’s inference that the Plan amendment applied only to certain Plan participants. The PBGC’s arguments to the contrary are self-serving, and extra-contractual. Having deemed section 26(G) of the 2001 PWA a valid Plan amendment effective prior to DOPT-5, the PBGC must construe the amendment’s terms according to its language, not by some unstated premise that the PBGC wishes to read into the Plan.

B. The Annual Cost of Living Adjustments to the Qualified Benefit Limit Are Not “Automatic Benefit Increases”

102. As with the Compensation Limit, Congress also provides for yearly COLAs to the Qualified Benefit Limit, *see* IRC § 415(d), which are expressly incorporated by Section 1.12 of the Delta Pilots’ Plan. And as it did with the § 401(a)(17) Compensation Limit COLAs, the PBGC treated the Qualified Benefit Limit COLAs as automatic benefit increases under 29 C.F.R. § 4044.13(b)(5), and it thus excluded from PC3 the 2004, 2005, and 2006 COLAs. *See* Ex. H, Appeals

Board Dec. at 41. For the same reasons outlined above in discussing the Compensation Limit COLAs, the Qualified Benefit Limit COLAs are *not* “automatic increases in the benefit formula”: (1) they are contained in a section of the plan (Section 1.12) that is separate and apart from the Plan’s benefit formula, which is set out in Section 5.01; (2) the § 415(b) limit operates to *reduce*, not increase, the benefits that a participant would otherwise be entitled to under the formula, with the COLAs simply lessening that reduction; and (3) even if the COLAs can be construed as “increasing” benefits, that increase is not “automatic,” as a participant with a formula benefit that is equal to or less than the § 415(b) limit does not see any increase in benefits from the annual COLAs.

103. Internal Revenue Service (“IRS”) regulations require that ERISA plan provisions “preclude the possibility that the limitations imposed by section 415 will be exceeded.” Treas. Reg. § 1.415(a)-1(d)(1). The Plan’s adoption of these limitations was not a mere formality, but was part of the process by which the Plan complied with tax requirements under the IRC.

104. Section 415(b) does not create any new vested benefit, but merely limits what the Plan would otherwise pay to participants and beneficiaries based on accrual formulas in place for more than five years prior to Plan termination. The Qualified Benefit Limit is, in short, simply a tax provision that does not create

a benefit increase as it rises but merely dictates, as a tax matter, from which source (namely from the Plan, or instead from a non-tax-qualified source) a participant's existing benefits are taken.

105. Even if an increase in the Qualified Benefit Limit is viewed as a benefit increase for the purposes of ERISA, which it should not be, the § 415(b) increase contained in the Plan is entitled to PC3 status within the meaning of 29 U.S.C. § 1344(a)(3). Again, in pertinent part, that statutory provision places benefits in PC3 status “based on the provisions of the plan (as in effect during the 5-year period ending on [the] date [of termination]), under which such benefit would be the least.” 29 U.S.C. § 1344(a)(3)(B). The Qualified Benefit Limit increase is “based on the provisions of a plan” that were adopted more than five years before Plan termination, and these “provisions of the plan” were “in effect” for the entirety of the five-year period ending on the date of termination.

106. The PBGC refused to give PC3 status to the benefits resulting from the Plan provisions incorporating the Qualified Benefit Limit increases. The PBGC determined that another portion of 29 U.S.C. § 1344(a)(3), which requires the contested benefit to be eligible for pay status three years prior to Plan termination in order for PC3 status to attach, made ineligible for PC3 status all increases in the amount of funds received within three years of Plan termination –

even where the increase in benefits arose from a Plan provision in place more than five years prior to termination, and even though Plaintiffs were eligible for receipt of this benefit more than three years prior to Plan termination.

107. In making its determination, the PBGC purported to apply the provisions of 29 C.F.R. § 4044.13(b)(5) to the Plan provision containing the Qualified Benefit Limit reference. This regulation, if read as the PBGC insists, arbitrarily and capriciously limits payment amounts to those amounts existing three years before Plan termination, even where increased payments were made pursuant to longstanding Plan provisions, and even where any increase in the amount of the payment will occur solely as the result of Congressional action and thus is completely outside the control of the employer.

108. The PBGC erroneously applied 29 U.S.C. § 1344(a)(3) and unlawfully reduced Plaintiffs' benefits as a result. The PBGC's construction of the statute is inconsistent with the statutory language and the underlying statutory scheme. The purpose of § 1344(a)(3) is to prevent employers from abusing the protections of ERISA by increasing unfunded plan benefits in anticipation of termination and to ensure that benefit calculations are made in a conservative fashion by using the method of calculation that results in the lowest benefit. An increase in payments that occurs solely as the result of Congressional action,

pursuant to provisions that pre-date the Plan termination date by many years, raises none of these concerns. By contrast, the payment of such benefits in compliance with statutorily-enacted increases effectuates the Congressional goal of safeguarding employees against the loss of anticipated retirement benefits occasioned by the absence of insurance protection when plans terminate with insufficient funds to cover vested benefits.

109. Insofar as 29 C.F.R. § 4044.13(b)(5) calls for the result reached by the PBGC, the regulation violates ERISA and is invalid and unenforceable.

Claim Three

(Failure to Comply With ERISA – Allocation of Remaining Plan Assets Without Consideration of Fact That the PBGC Allowed Almost \$2 Billion to Escape ERISA’s Asset Allocation Scheme To Fund Pension Benefits Just Before PBGC Assumed Its Role as Statutory Trustee)

110. Each and every allegation in this Complaint is incorporated into this claim for relief.

111. Another error infecting the Pilots’ benefit determinations arose when the PBGC, acting in its role as trustee of the terminated Plan, allocated remaining assets without factoring in that the Pilots who were active at the time of Plan termination had received from Delta over \$1.8 billion in exchange for ALPA’s consent to terminate the Plan.

112. Most of the facts asserted in support of this claim are found in pleadings filed by the PBGC itself during the Delta bankruptcy proceedings. In those proceedings the PBGC noted that the agreement between the then-active pilots (*i.e.*, the participants the PBGC has determined will receive guaranteed insurance benefits in PC4 when they retire) and Delta was “designed in substantial part to skirt [ERISA’s] safeguards,” Exhibit A, PBGC Objection at 14, in that it would allow Delta to fund the pension benefits the active pilots would lose as a result of the Plan’s termination, in contravention of ERISA’s asset allocation scheme.

113. The result was an allocation of Plan assets that violated Congress’ statutory scheme: Delta Pilots who were entitled to priority in the allocation of Plan assets – those in PC3 – were deprived of pension benefits ERISA mandates that they receive, while those whom Congress placed further to the back of the line – those outside of PC3 – received over \$1.8 billion from Delta to fund their pension benefits before the asset allocation process even began. The PBGC, when it assumed its role as statutory trustee, had both the ability and the duty to remedy this violation of ERISA so as to ensure that ERISA’s asset allocation scheme was honored. The PBGC failed to do so.

114. As noted above, Delta and ALPA entered into negotiations in 2006 regarding the termination of the Plan. Pursuant to LOA #51, ALPA agreed it would not oppose the termination of the Plan. As consideration for agreeing to the termination, ALPA was to receive a \$650 million payment (in notes), as well as a \$2.1 billion allowed general non-priority unsecured claim under § 502 of the Bankruptcy Code, for which ALPA pilots received approximately 60 cents on the dollar.

115. When ALPA and Delta sought the bankruptcy court's permission to enter into LOA #51, the PBGC strenuously objected, arguing that the agreement was contrary to ERISA in that it allowed funds to which the PBGC would otherwise be entitled to leave the control of the Plan sponsor/control group, and those funds would ultimately go to fund pension benefits outside of the priority scheme specified by ERISA. After the bankruptcy court approved the agreement, the PBGC appealed to the district court.

116. Notwithstanding its strenuous objections to the legality of LOA #51, the PBGC later withdrew its appeal after reaching a settlement agreement with Delta in December 2006.

117. Delta's agreement with ALPA to terminate the Pilots' pension plan – in which ALPA members received approximately \$1.2 billion from the claims and

\$650 million from the notes – diverted over \$1.8 billion that could otherwise have gone to fund Plan benefits. Had the PBGC pursued its appeal of LOA #51, rather than entering a settlement with Delta to the detriment of the Plan’s participants, it is likely those additional resources would have been available to fund benefits under the Plan under Congress’s statutory priority scheme. Those additional recoveries would have been sufficient to fund all of Plaintiffs’ lost benefits, even assuming the PBGC’s decision to cast those benefits as being outside of PC3 was correct.

118. As successor trustee, the PBGC is responsible for taking action to make Plaintiffs whole, particularly given its complicity in assisting the ALPA pilots to avoid the statutory priority scheme by withdrawing its appeal of the approval of LOA#51 in exchange for its settlement with Delta. This responsibility can include, among other things, an obligation to take all actions to place Plaintiffs where they would have been monetarily had the PBGC complied with ERISA.

Claim Four
(Failure to Comply With ERISA -- Improper Allocation of Funds Recovered
From Delta After Termination)

119. Each and every allegation in this Complaint is incorporated into this claim for relief.

120. The PBGC, as trustee of the terminated Plan, also committed a number of errors in allocating the funds it recovered from Delta after the Plan's termination. These errors unfairly reduced Plaintiffs' share of these funds.

A. Congress's Allocation Formula

121. Whenever a plan is terminated for distress, as the Delta Pilots' Pension Plan was, the plan sponsor becomes liable to the PBGC for certain unfunded benefit liabilities. *See* ERISA § 4062, 29 U.S.C. § 1362. The PBGC is authorized to recover these liabilities, and is also authorized to agree to "alternative arrangements" for the satisfaction of these liabilities. *Id.* § 4062(a)(3), 29 U.S.C. § 1362(a)(3). When the PBGC secures these "recoveries" under ERISA § 4062, as it did here, then ERISA § 4022(c), 29 U.S.C. § 1322(c), provides a formula for allocating a ratio of the recovered funds to plan participants and beneficiaries. The PBGC recovery amount to which the participants and beneficiaries are entitled (the "4022(c) amount") is determined by multiplying the outstanding amount of benefit liabilities under the plan (including interest calculated from the termination date) by the applicable recovery ratio. 29 U.S.C. § 1322(c)(2). The recovery ratio, in turn, is determined by taking the ratio of "(i) the value of the recoveries of the corporation under section 1362, 1363, or 1364 of

this title in connection with such plan, to (ii) the amount of unfunded benefit liabilities under such plan as of the termination date.” *Id.* § 1322(c)(3)(C).

122. In short, when the PBGC gains recoveries, as it did here, Congress directs that it determine the proportion of those recoveries that will be allocated to Plan assets by calculating a recovery ratio. Congress has then specifically directed the PBGC to determine that ratio by calculating (1) the value of all recoveries, and comparing that amount to (2) the amount of unfunded benefit liabilities as of the termination date.

B. The PBGC’s Flawed Application of Allocation Formula to the Delta Pilots’ Plan

123. Despite Congress’s clear directive, the PBGC calculated the recovery ratio for the Pilots in a very different manner. First, the PBGC determined that it had obtained approximately \$1.279 billion from Delta in § 4062 recoveries. Ex. H, Appeals Board Decision at 45. It calculated this number by adding the total recoveries, but then actuarially adjusting them to a common date – *i.e.*, it added the value of the recoveries as of May 3, 2007 – the date when the PBGC received its first recovery from Delta. According to the PBGC, it was authorized to make such a calculation by its internal policy 8.2-1, a non-public document that the PBGC printed from its own “intranet” and attached to the Appeals Board decision as Enclosure 6. This adjustment decreased the nominal amount of the recovery by

approximately \$5.5 million dollars. Second, the PBGC then reduced the recovery amount by an additional \$50 million to reflect its value on the date of Plan termination. The PBGC made this latter reduction even though § 1322(c)(2)(i) squarely directs it to calculate the “(i) the value of the recoveries of the corporation under section 1362, 1363, or 1364 of this title in connection with such plan,” without regard to the Plan termination date. There is also no articulable basis for reducing the value of the recovery based on the termination date, since Congress clearly directed the “value” of any recovery to be compared to “the amount of unfunded benefit liabilities under such plan as of the termination date.” 29 U.S.C. § 1322(c)(3)(C)(ii). Congress clearly knew how to direct the PBGC to use the “termination date” in calculating the recovery ratio, as it expressly directed the PBGC to factor it into the denominator, but not the numerator. Without explanation, however, the PBGC did both, arbitrarily and capriciously decreasing the amount of any recovery – and the corresponding amount provided to participants – by \$55,500,000.

124. After incorrectly determining the amount of the recovery to be \$1.229 billion (rather than \$1.279 billion or \$1.285 billion), the PBGC then apparently determined that this amount should be divided further into two different claims, one for Unfunded Benefit Liabilities (UBL) and one for Due and Unpaid

Employer Contributions (DUEC). According to the PBGC, it determined that the UBL portion of the recovery was \$988,741,430 and that the DUEC portion was \$240,263,310. It claims then to have deemed the DUEC portion of the recovery as Plan assets, using only the UBL portion to determine the recovery ratio.

125. The PBGC then determined that the amount of unfunded benefit liabilities as of the termination date was \$2.567 billion. This became the denominator of the recovery ratio set forth in § 1322(c)(3)(C).

126. The PBGC thereafter calculated the recovery ratio by dividing the value it had determined for the recovery (\$988,741,430) by the amount of unfunded benefit liabilities (\$2,567,680,000). This led to a recovery ratio of 38.61%.

127. Using this recovery ratio, the PBGC determined that it would then use the recovery to pay 38.61% of the unfunded non-guaranteed benefits, for a final § 1322 amount of \$681,259,882.

128. This ratio was arbitrary and capricious because the PBGC added an unlawful step to the formula set forth by Congress – by reducing the amount of

the recovery to the date of Plan termination – that eliminated \$55.5 million dollars from the funds the PBGC should have put toward pension benefits.¹⁴

C. The PBGC Erred in Allocating Recovered Funds Without Regard to the Fact that Active PC4 Participants Received Substantial Pension Payments In Connection with the Plan’s Termination

129. The PBGC also erred when it allocated the recovered funds without regard to the fact that, as discussed above, PC4 participants who were active at the time of the Plan’s termination received a substantial amount of Plan assets before termination. As a result, these active PC4 participants received a priority in the allocation of the remaining assets to which they were not entitled.

130. ERISA § 4044(b)(4), 29 U.S.C. § 1344, directs the PBGC to prioritize recovered assets by first trying to make up any lost benefits that were not provided pursuant to Plan provisions that were in existence more than 5 years before termination. Assuming all PC3 benefits are paid, the maximum benefit guarantee will often affect the PC4 participants most harshly by limiting them to that amount, even though they were entitled to substantially more in benefits pursuant to longstanding Plan provisions. In a normal situation, where all PC3 benefits are

¹⁴ Assuming an average return of 9% compounded annually, the PBGC has earned approximately \$45 million in interest on its original \$55 million extra-statutory “discount.”

honored and the PC4 beneficiaries have had their benefits capped, it would make sense to allocate the recovered funds as the PBGC did.

131. Here, however, the majority of PC4 pilots in this Plan did not, in fact, have their benefits capped by the maximum benefit limit in the way contemplated by the PBGC. As noted in the previous section, Delta's deal with ALPA to terminate the Plan – in which ALPA members (who consist entirely of active pilots who will receive over \$700 million in guaranteed benefits), received approximately \$1.2 billion from the claims and \$650 million from the notes – diverted over \$1.8 billion which could otherwise have gone to fund the Plan. Those funds should have been treated as pension benefits, reducing the amount of PC5 recoveries made to the active PC4 pilots.

D. The PBGC Erroneously Applied Outdated IRC limits in Allocating Recovered Funds Under PC5(a)

132. Finally, the PBGC erroneously excluded the 2001-06 increases to the Compensation Limit and the Qualified Benefit Limit in allocating the recovered funds that were to be distributed to the Plan's participants and beneficiaries under subsection (a) of Priority Category 5 ("PC5").

133. First, for the same reasons discussed above, these were Congressional changes to the law not subject to the five-year "effectiveness inquiry," which Congress reserved for changes implemented by a plan sponsor to its particular

pension plan, rather than mandates imposed by Congress itself, applicable to all pension plans nationally.

134. Moreover, and as also discussed above, the Plan provisions that created this basic pension formula were in effect long before Plan termination, and there was no lawful basis to use these IRC Code provisions to limit the amounts available to participants in PC3.

135. But even assuming, *arguendo*, that the IRC provisions could fairly limit PC3 benefits, those same limits should have been removed when distributing funds in PC5.

136. ERISA § 4044(b)(4)(A), 29 U.S.C. § 1344(b)(4)(A), governs the allocation of benefits within PC5, and provides in pertinent part:

- (4) This paragraph applies if the assets available for allocation under paragraph (5) of subsection (a) of this section are not sufficient to satisfy in full the benefits of individuals described in that paragraph.
 - (A) If this paragraph applies, except as provided in subparagraph (B), the assets shall be allocated to the benefits of individuals described in such paragraph (5) on the basis of the benefits of individuals which would have been described in such paragraph (5) *under the plan as in effect at the beginning of the 5-year period ending on the date of plan termination.*

Id. (emphasis added).

137. This provision accordingly gives priority within PC5 to the benefits “under *the Plan as in effect* at the beginning of the 5-year date ending on the date of Plan termination.” *Id.*

138. Assuming *arguendo* that the PBGC correctly construed the PC3 provisions – which it did not, as discussed above – this language is quite different from the PC3 language in ERISA § 4044(a)(3), 29 U.S.C. § 1344(a)(3). Unlike the PC3 language, the PC5 language focuses solely on when a Plan provision went into “effect.” Assuming, *arguendo*, that the relevant inquiry here should focus on when the implementing plan amendment incorporating the Congressionally mandated changes went into effect, *this* Plan amendment went into effect no later than September 1, 2001, which was more than five years before Plan termination.

139. Nonetheless, despite this difference in language, the PBGC found that it must apply the same rule regarding when a plan provision or amendment is “in effect” under PC5(a) as under PC3, *i.e.*, it may only qualify for inclusion in these categories if it was “payable” within the five-year window preceding a plan’s termination. Ex. K, Appeals Board Dec. at 52-54. However, given that the PBGC allocated the vast majority of PC5(a) assets (over \$517 million) to the benefits of pilots who were still active as of September 2006 (and who, were unlikely to have been eligible to receive *any* benefit under the Plan as of September 2001 since no

benefits were conceivably “payable” five years before they retired), this assertion is arbitrary and capricious. *See* Ex. E, Actuarial Case Memo at 1.

140. There is no rational basis for failing to give priority to benefits that had been calculated under the IRC limits on qualified benefit payments that Congress adopted prior to Plan termination, and that were incorporated into Plaintiffs’ benefits pursuant to long-standing Plan provisions. The Court should order the PBGC to correct Plan asset allocations accordingly and make any necessary adjustments to individual benefit determinations.

Claim Five
(Breach of Fiduciary Duty/Violations of ERISA/Disgorgement)

141. Each and every allegation in this Complaint is incorporated into this claim for relief.

142. In volunteering to assume the responsibilities of Plan trustee, the PBGC became a fiduciary of the Plan. 29 U.S.C. § 1342(d)(3). As a fiduciary of the Plan, the PBGC must execute its duties as trustee “for the exclusive purpose of providing benefits to participants and beneficiaries,” with the appropriate level of “care, skill, prudence, and diligence,” and “in accordance with the documents and instruments governing the plan.” 29 U.S.C. § 1104(a)(1).

143. As described above, the PBGC has sought to withhold or delay the production of information critical to understanding the PBGC’s benefit

determinations and asset allocation choices. For example, in contravention both of its fiduciary duties and Plaintiffs' rights under the Privacy Act, the PBGC refused for over a year to provide Plaintiffs basic information about their pension benefits, relenting only after Plaintiffs filed an administrative appeal of the PBGC's disclosure decision. Because this information was necessary to enable an informed appeal of the PBGC's benefit determinations, the PBGC's stonewalling needlessly prolonged the appeals process far beyond what a competent and loyal fiduciary would have provided.

144. As described above, the PBGC has, in contravention of its duty of prudence and loyalty, created procedural obstacles at every opportunity in order to bar Plan participants from exercising their rights under ERISA and pursuing appeals. For example, the PBGC arbitrarily deemed more than 300 Appellants "untimely" for missing its forty-five day appeal deadline, some of whom missed the deadline by a matter of days, notwithstanding the PBGC's own months-long, indeed, year-long, delays in providing these same Appellants with the information necessary for an informed appeal. At a minimum, because they had no meaningful way of determining within the forty-five day period whether to appeal and thus no meaningful right to appeal at the time, the PBGC's enforcement of the

deadline to these Appellants is arbitrary and capricious in violation of ERISA and the PBGC's fiduciary obligations.

145. As described above, the PBGC has manipulated the asset allocation process in such a manner as to create hundreds of millions of dollars of investment returns to itself, at Plaintiffs' expense, in contravention of its fiduciary duties. Again, the PBGC has made self-serving asset allocation choices that have consistently and erroneously favored younger active participants over older participants. The various delays and information stone-walling by the PBGC have served to obscure both the errors underlying the PBGC's determinations, and the unjust enrichment the PBGC has enjoyed as a consequence of its fiduciary breaches.

146. As a consequence of the fiduciary breaches described above (including delays), the PBGC has unjustly earned massive investment returns off of assets that should have been timely allocated to Plaintiffs, and the PBGC should be required to disgorge itself of this unjust enrichment.

Claim Six -- Violation of the APA

147. Each and every allegation in this Complaint is incorporated into this claim for relief.

148. The PBGC's failure to provide Plaintiffs with benefits authorized by ERISA and by the terms of the Plan is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706. All of the claims raised with respect to ERISA are accordingly, to the extent necessary and proper, subject to redress under the APA.

149. The PBGC's calculation of Plaintiffs' benefits is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706.

150. The PBGC's construction of statutes and regulations in the process of categorizing benefits is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law within meaning of the APA, 5 U.S.C. § 706.

Moreover, the PBGC's enforcement of its forty-five day appeal deadline to more than 300 participants, when they had no meaningful way of determining whether to appeal and thus no meaningful right to appeal at the time, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law within meaning of the APA, 5 U.S.C. § 706.

151. The PBGC's construction of statutes and regulations in the process of administering its appeals process, and in determining what information Plaintiffs are entitled to in connection with their appeals, is arbitrary, capricious, an abuse of

discretion, and otherwise not in accordance with law within meaning of the APA, 5 U.S.C. § 706.

152. Insofar as the PBGC, in making the determinations addressed in this Complaint, has relied on regulations that are inconsistent with ERISA, the regulations are invalid and unenforceable and must be set aside pursuant to the APA.

WHEREFORE, Plaintiffs respectfully request that this Court issue:

- A. A judgment enforcing the rights of Plaintiffs under ERISA and the terms of the Plan;
- B. A judgment awarding benefits to Plaintiffs due to them under the terms of the Plan and pursuant to the PBGC's obligation to serve as a guarantor, trustee, and plan administrator of the Plan;
- C. A judgment declaring the rights and obligations of the parties;
- D. A judgment enjoining the PBGC from any act or practice that violates ERISA or the terms of the Plan;
- E. A judgment setting aside all PBGC regulations applied in the circumstances that violate ERISA;
- F. An accounting of all premiums paid to the PBGC by Delta in connection with the Plan since 1974;

G. The creation of a constructive trust over all premiums in the PBGC's possession that were paid to the PBGC by Delta in connection with the Plan since 1974, for the benefit of those Pilots who have not received their full non-forfeitable Plan benefits following termination of the Plan and sufficiently to remedy the PBGC's breach of fiduciary duty;

H. An award of monetary relief against the PBGC as trustee in an amount equal to the difference between (1) the benefits properly to be received by the Pilots based on the Plan's current funding plus the PBGC's insurance guarantee; and (2) the benefits properly to be received by the Pilots based on the funding the Plan would have had had the PBGC not breached its fiduciary duty plus the PBGC's insurance guarantee;

I. Other equitable relief, including disgorgement and surcharge (concerning, for instance, investment income earned on the Plan's assets held by the PBGC as trustee), and prejudgment interest sufficient to redress the PBGC's unjust enrichment and its violations of ERISA and to enforce ERISA and the terms of the Plan;

J. Any other equitable relief that is available and appropriate;

K Attorney fees and other expenses and costs pursuant to 29 U.S.C. § 1303(f)(3);

L. Attorney fees and other expenses and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504(a)(2), because the positions of the PBGC are not substantially justified;

M. A jury trial for all issues so triable; and

N. Any such other relief, of any sort, that the Court finds just and proper.

RESPECTFULLY SUBMITTED this 2nd day of December, 2014.

THE BARNES LAW GROUP, LLC

s/ Roy E. Barnes

ROY E. BARNES

GA Bar No. 039000

roy@barneslawgroup.com

JOHN R. BEVIS

GA Bar No. 056110

bevis@barneslawgroup.com

J. Cameron Tribble

GA Bar No. 754759

ctribble@barneslawgroup.com

31 Atlanta Street
Marietta, GA 30060
Tel. (770) 419-8505
Fax. (770) 590-8958

Attorneys for Plaintiffs

MILLER & CHEVALIER CHARTERED

Anthony F. Shelley*

ashelley@milchev.com

Timothy P. O'Toole *

totoole@milchev.com

Michael N. Khalil*

mkhalil@milchev.com

655 Fifteenth Street, N.W., Suite 900

Washington, DC 20005-5701

Tel. (202) 626-5800

Fax. (202) 628-5801

Attorneys for Plaintiffs

*Pro Hac Vice Applications to follow the
filing of this complaint